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83-226

NO. 83-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

IN A STATE WHERE IN THE CAPITAL SENTENCING PROCEDURE THE TRIAL COURT IS REQUIRED TO IMPOSE A SENTENCE OF DEATH IF THE STATE PROVES THE EXISTENCE OF ONE OR MORE AGGRAVATING FACTORS AND THE DEFENDANT FAILS TO PROVE ANY MITIGATING FACTORS, IF THE TRIAL COURT ERRS AS A MATTER OF LAW AND CONCLUDES THAT THE FACTS PROVED BY THE STATE DO NOT ESTABLISH AN AGGRAVATING CIRCUMSTANCE, MAY THE STATE APPELLATE COURT VACATE THE LIFE SENTENCE AND REMAND FOR A RESENTENCING WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The 1983 Arizona Supreme Court opinion holding that a resentencing of Rumsey was precluded by the double jeopardy clause is not yet reported in any official reporter. That opinion is appended here as Exhibit "A". The order denying the motion for rehearing on the 1983 opinion is appended as Exhibit "B". The Arizona Supreme Court opinion remanding the Rumsey case for resentencing is reported in 130 Ariz. 427, 636 P.2d 1209 (1981), and is appended here as Exhibit "C".

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court which the state asks this Court to review was entered on April 14, 1983. The state's motion for rehearing before the Arizona Supreme Court was denied on June 14, 1983. This petition was filed

within 60 days from that denial. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> (N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On December 6, 1979, Dennis Rumsey, the respondent, was charged with armed robbery and first-degree murder. In October, 1979, Mr. Rumsey and a female

companion were hitchhiking when the victim picked them up. When all three stopped to buy some beer, Rumsey noticed that the victim had money and he told his companion he was going to rob the victim. Later, while Rumsey was driving the vehicle, he pulled off the road, woke the victim, who was sleeping in the backseat, and, at gunpoint, ordered the victim to empty his pockets. Rumsey then shot the victim and left him beside the road.

Rumsey went to trial before a jury in June of 1980. He was convicted of armed robbery and first-degree murder and, on July 3, 1980, in accord with Ariz.Rev.Stat.Ann. § 13-703, a hearing to determine sentence was held before the trial court. As is permitted by statute, the state cited evidence adduced at trial and argued that the following three

statutory aggravating circumstances, one of which was necessary for imposition of the death penalty, had been proved by the trial evidence: (1) Rumsey "created a grave risk of death to another" [Ariz.Rev.Stat.Ann. § 13-703(F)(3)]; (2) Rumsey committed the offense expecting pecuniary gain [Ariz.Rev.Stat.Ann. § 13-703(F)(5)]; and (3) Rumsey committed the crime in an "especially heinous, cruel or depraved manner" [Ariz.Rev.Stat.Ann. § 13-703(F)(6)]. In mitigation [Ariz.Rev.Stat.Ann. § 13-703(G)] Rumsey presented the foreman of the trial jury as a witness. He testified that the murder verdict rested on the felony-murder theory advanced by the state and added that the jurors felt a life sentence was appropriate. In addition to that one witness, Rumsey's counsel argued to the trial judge that he

and most of the jury felt respondent should receive a life sentence. Four days later, July 7, 1980, the trial court decided that Rumsey's acts had not created a grave risk of death to another, that Rumsey did not commit the offense in an especially heinous, cruel or depraved manner, and that the pecuniary gain circumstance was not applicable because that statutory circumstance applied only to hired killers and was not meant to reach convicted murderers who committed their crimes during robberies, a contention which the state argued against during the sentencing proceedings. Also, the trial court decided there was nothing that would mitigate the sentence. Because the court found no aggravating circumstances, the trial court could not impose a death sentence under Arizona law. He sentenced Rumsey to life for the

murder and 21 years for the robbery, the robbery sentence to run consecutively to the life sentence.

Three weeks after the sentencing, the Arizona Supreme Court, in an unrelated case, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), ruled that the pecuniary gain aggravating circumstance, Ariz.Rev.Stat.Ann. § 13-703(F)(5), was not limited to hired killers, that it did apply to those who robbed for pecuniary gain as Rumsey had.

Both Rumsey and the state appealed. Rumsey appealed from the imposition of consecutive sentences; the state appealed from the imposition of a life sentence. Ariz.Rev.Stat.Ann. § 13-4032. The state maintained that the trial court was wrong in its legal conclusion that the pecuniary gain circumstance was limited

to hired killers and cited State v. Clark, supra, as authority. On December 8, 1981, the Arizona Supreme Court vacated Rumsey's life sentence for murder and remanded for resentencing on the first-degree murder conviction. The basis for the supreme court's ruling was that the trial judge had "erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain." State v. Rumsey, supra, 130 Ariz. at 427, 636 P.2d at 1209 (1981).

On February 1, 1982, the same trial judge who originally sentenced Rumsey held a second sentencing hearing. No evidence was presented but both counsel argued. The state argued that the trial court was now free to find that the crime had been committed for pecuniary gain and free to impose a death sentence. Rumsey

argued that Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prevented the court from imposing a death sentence. On February 4 the trial court found that one aggravating circumstance existed, Rumsey had committed the crime for pecuniary gain. The court also found there was no mitigation and imposed a death sentence.

Appeal of the death sentence to the Arizona Supreme Court was automatic under Rule 31.7, Arizona Rules of Criminal Procedure. On April 14, 1983, that court ruled that the interpretation this Court placed upon the double jeopardy clause in Bullington v. Missouri prevented the trial court from imposing a death sentence once it had imposed a life sentence. State v. Rumsey, No. 5042-2 (Ariz.Sup.Ct., Apr. 14, 1983). (Appendix "A" to this petition.)

ARGUMENT

Review should be granted because the Arizona Supreme Court has decided an important question of federal law that has not been decided by this Court. If Bullington does apply to situations like Rumsey's, then similar resentencings in three states in addition to Arizona may well be affected and appellate courts in Arizona and in the other three states will be hampered in reviewing cases in which a life sentence has been erroneously or illegally imposed. The result will be that reviewing courts in those states will be less able to control the development of arbitrary distinctions in death penalty cases.[1]

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1. A good example of this is two cases pending before the Idaho Supreme Court. In one case, State v. Small, Nos. 14701, 14702 (Idaho Sup.Ct., filed July 12, 1982) the trial judge imposed a life sentence holding that the United

The issue here is a narrow one. Dennis Rumsey was found guilty of first-degree murder. If, at the subsequent sentencing hearing, the trial court found the existence of one aggravating circumstance and no mitigating circumstances, the trial court was required to impose a death sentence. At that hearing, the state did prove an aggravating circumstance and Rumsey failed to prove any mitigation. The state proved that Rumsey murdered the victim to rob him, a murder for pecuniary gain. But Rumsey received a life sentence because the

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States Constitution prohibited a death penalty for anyone other than the one who did the act of killing. In the second case, State v. Caudill, No. 14727 (Idaho Sup.Ct., filed Aug. 25, 1982), the trial judge imposed a life sentence because he considered as mitigation the victim's involvement with the defendant in illegal drug activities. The state is cross-appealing in both cases and seeks resentencings where death penalties may be reconsidered.

trial court made a legal error. Although the trial court found that Rumsey robbed the victim, the court concluded that the pecuniary gain aggravating circumstance applied only to hired killers.[2] The question is: May the Arizona Supreme Court vacate an erroneous life sentence based upon a legal error and remand for resentencing to correct the trial court error?

An appeal by a state to review a sentence is not prohibited by the United States Constitution. See United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). And the

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2. Interestingly enough, to raise Rumsey's armed robbery sentence from the statutory presumption of 7 years to the consecutive 21-year sentence imposed, the trial court found an aggravating circumstance that Rumsey planned the robbery for pecuniary gain. Ariz.Rev.Stat.Ann. §§ 702, 1904.

possibility that success might result in a more stringent sentence does not offend the Constitution. A state appeal and review of a sentence violate the constitutional double jeopardy clause only if the original sentence is to be treated in the same way as an acquittal. United States v. DiFrancesco, supra. The Arizona Supreme Court felt that Bullington v. Missouri required Rumsey's life sentence to be treated as an acquittal. But Bullington does not require that; the Arizona and Missouri sentencing schemes are different. The Arizona scheme does not have the indicia of an adversarial proceeding the Missouri procedure has, and the Arizona scheme does not give the state "the opportunity to convince a second factfinder of its view of the facts." Bullington v. Missouri, supra, 451 U.S. at 440, 101 S.Ct. at 1859, 68 L.Ed.2d at 280.

In Arizona, once a defendant has been convicted by a jury of first-degree murder, the jury has nothing more to do with the case. Sentence is determined by the trial court after a hearing during which the court decides if any statutory aggravating circumstances exist, if any mitigating circumstances have been shown, and whether the mitigation is substantial enough to call for leniency. If the court determines that a statutory aggravating circumstance is proved beyond a reasonable doubt and that no mitigation has been shown, the court must impose a death sentence. State v. Gretzler, ___ Ariz.____, 659 P.2d 1 (1983). If an aggravating circumstance has been proved and mitigation has been shown but it is not substantial enough to call for leniency, the court must impose a death sentence. If the court finds that no

aggravating circumstance has been proved, the court must impose a life sentence.

Three other states have adopted death sentencing procedures similar to Arizona's procedure.[3] Two states use the jury only as an advisor on sentence.[4]

The sentencing procedure followed by

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3. Idaho, Idaho Code § 19-2515 (1979); Montana, Mont. Code Ann. § 46-18-301 (1979); Nebraska, Neb.Rev.Stat. § 29-2520 (1979). The Montana Supreme Court has decided that the Missouri procedure is not similar to theirs in a case where the issue was whether a defendant could be resentenced to death on a particular theory of culpability after the trial court had erroneously concluded that that theory did not apply. The Montana Supreme Court held that the defendant could be resentenced to death on that theory. Fitzpatrick v. State, ____Mont.____, 638 P.2d 1002, cert. denied, 449 U.S. 891 (1981).

4. Alabama, Ala.Code § 13A-5-46 (1975); Florida, Fla.Stat.Ann. § 921.141 (West 1972).

Arizona differs from that described in Bullington v. Missouri in the following respects: (1) in Arizona there is no jury; (2) although permitted, there are seldom live witnesses in an Arizona sentencing hearing; (3) no opening statements are required by the Arizona statute; (4) closing arguments are permitted but not required by the Arizona statute; (5) no instructions to the fact finder are required by the Arizona statute; (6) although the aggravating circumstances must be shown beyond a reasonable doubt, according to Arizona case law, State v. Jordan, 126 Ariz. 283, 614 P.2d 825, cert. denied, 449 U.S. 986 (1980), it need not be determined beyond a reasonable doubt that the mitigation is substantial enough to call for a life sentence, and (7) the state must follow the rules of evidence when it introduces

aggravation, but the defense need not follow those rules when introducing mitigation, or the prosecution in rebutting mitigation.

Missouri's capital sentencing procedure closely resembles a trial on the issue of guilt. A Missouri jury, with all the trappings and procedures commonly attending jury trials on guilt, determines whether the state has proved its case; when a Missouri jury delivers a life sentence they, in a very real sense, acquit the defendant of those things necessary to impose death. Arizona's procedure is not as adversarial or final. In a typical Arizona sentencing hearing, the prosecutor begins by telling the court that the evidence he relies upon to show one or more of the aggravating circumstances is some or all of the evidence he presented at trial [as

the government did in United States v. DiFrancesco, 449 U.S. 117, 124, 101 S.Ct. 426, 430, 66 L.Ed.2d 328, 337 (1980)]. The prosecutor may introduce certified copies of prior convictions to show aggravation (as the government did in United States v. DiFrancesco, supra). The court then calls upon the defense to show mitigation. The defense attorney may refer to things that were in evidence at trial; he may, because he does not have to follow the rules of evidence, relate things he has learned about the defendant, his background and his family; he may cite defendant's age; he may argue defendant's relative culpability and the culpability of others; or he may attack the showing of aggravation (as the defense did in United States v. DiFrancesco, supra). If the defense produces a witness, it is ordinarily a

doctor or a family member who may testify to the defendant's troubled background. Although permitted, there is rarely rebuttal evidence from the state at a sentencing hearing.

Once the state has shown its aggravation and the defense its mitigation, each side may argue what penalty the statutory factors mandate. When that is done, the trial court states what aggravation it finds, what mitigation it finds, and whether the aggravation outweighs the mitigation (in a manner similar to the trial court's findings in United States v. DiFrancesco, supra). If death is imposed, an appeal is automatic. Once the appeal is perfected, the Arizona Supreme Court conducts an independent review of the aggravating and mitigating evidence and

decides independently whether the death sentence should be imposed. State v. Gretzler, supra, ____Ariz. at ____, 659 P.2d at 13 (1983). The Arizona Supreme Court looks at everything anew, makes its own determination of what is and what is not aggravation and mitigation, and then does its own weighing, aggravation against mitigation. This review has resulted in the reduction of nine death sentences to life, six in which the Arizona Supreme Court concluded, contrary to the trial judge's finding, that the mitigation was substantial enough to call for leniency,[5] and three in which the

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5. State v. McDaniel, No. 4220-2 (Ariz.Sup.Ct., Apr. 28, 1983); State v. Graham, ____Ariz.____, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 237 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977).

supreme court found insufficient evidence to sustain the trial court's finding of aggravation.[6] The Arizona Supreme Court, however, has never increased a life sentence to death.

Because of this review, the trial court sentencing procedure in Arizona is not a final step; it is more of an evidentiary hearing and an argument, a prelude to a final review by the supreme court. The sentencing hearing is a time to determine what aggravating facts exist and a time for the defense to marshall the facts of mitigation and present them in a way that will impress the Arizona Supreme Court when that court weighs the mitigation and compares it to mitigation in other

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6. State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 609 (1979); State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975).

cases. Although the state at the sentencing hearing may show as aggravation only those things that would be admissible under the rules of evidence at a trial, the purpose of that restriction is probably not to make the sentencing proceeding more like a trial, but to require more credibility and reliability of the facts upon which the death sentence may rest.

Until Bullington and the second Rumsey decision, the Arizona death sentence procedure allowed review by the Arizona Supreme Court of both death and life sentences. That procedure consists of the following: (1) Rule 31.2 of the Arizona Rules of Criminal Procedure provides for an automatic review when a death sentence is imposed; (2) Ariz.Rev.Stat.Ann. § 13-4032(4) permits the state to appeal on a question of law

when the defendant appeals either a life or death sentence; (3) Ariz.Rev.Stat.Ann. § 13-4032(6) permits the state to appeal when a sentence is illegal; (4) Ariz.Rev.Stat.Ann. § 13-4038 permits the Supreme Court to correct an illegal sentence; (5) cases such as State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915 (1977), establish the power of the supreme court to determine whether a death sentence is proportionate to penalties imposed in similar cases; and (6) the first Rumsey decision, 130 Ariz. 432, 636 P.2d 1714 (1982), established the power of the Supreme Court to correct a life sentence based upon an erroneous interpretation of Arizona law. This ability of a state supreme court to review both death and life sentences is important to insure that death sentences are not freakishly

imposed. To keep a sentence in proportion, it is important that courts have the ability to correct illegal or erroneous sentences and procedures that allow for such corrections should be encouraged unless they run afoul of constitutional provisions such as the double jeopardy clause. Prohibiting the correction of a life sentence that has been arrived at through a trial process where the state has failed to prove its case helps to preserve important values long recognized in double jeopardy cases. But those values are not diminished by correcting an erroneous sentence where the government was not put to the test of proving its case or, more to the point in this case, where at the sentencing hearing the government did prove its case. In the Rumsey case, the

state did prove its case.

Unlike the Missouri death sentencing procedure, correcting the error made by the Rumsey trial court need not have afforded the state a second chance to convince the sentencer of its view of the facts, which this Court considered important in distinguishing the procedure in DiFrancesco from that in Bullington. The Arizona Supreme Court could have corrected the error itself or sent the matter back to the trial court for correction and a reweighing of aggravation and mitigation.[7] See

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7. In the second Rumsey opinion, the Arizona Supreme Court answers the state's argument that the double jeopardy problem could be avoided if the court would hold that the trial judge committed an error of law and simply remanded for a correction of that error, by stating that the Court had already held in State v. Gretzler, supra, that new or different aggravating

State v. Gillies, ____Ariz.____, 662 P.2d 1007 (1983). What happened here is similar to what happened in United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1012, 43 L.Ed.2d 232 (1975), where this Court determined that the double jeopardy clause permitted overturning a post-verdict "acquittal" where the defendant would not have to be retried. Correction of the trial court's error in

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circumstances could be advanced by the state at a resentencing. Thus the court implied that if Rumsey were sent back for resentencing, Gretzler would invite the state to offer more aggravation than it offered at the initial sentencing and give the state a second chance at convincing the sentencer that death was the proper sentence. The court's reasoning, however, is fallacious; new or more aggravation could be introduced against Gretzler because he received a death sentence at his initial sentencing and thus had been acquitted of nothing. The Arizona Supreme Court has never ruled on whether new or additional aggravation may be introduced at a resentencing where life was the initial sentence.

Rumsey's case would not involve retrying him.[8]

Missouri's statutory procedure also permits a jury to be lenient and give a life sentence even though the jury finds the necessary statutory aggravation and the lack of necessary mitigation. This is very close to what a jury does at the guilt phase of a trial. Such a procedure allows a defendant to use his powers to convince a jury that they should be

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8. The Arizona Supreme Court relied upon the Wilson decision to overturn the trial court's granting of a motion for directed verdict after a jury verdict of guilty. The Arizona Supreme Court reinstated the jury verdict, noting that the reinstatment "would require no further fact-finding from the original jury and would not subject the defendant 'to a second trial before a second trier of fact.' Wilson, supra, 420 U.S. at 345, 95 S.Ct. at 1023, 43 L.Ed.2d at 243." State ex rel. Hyder v. Superior Court, 128 Ariz. 216, 221, 624 P.2d 1264, 1269 (1981).

lenient regardless of aggravation and mitigation. But this cannot happen under Arizona's system because, if aggravation is shown and it outweighs the mitigation, a death penalty must be imposed.

Permitting appeals like the one the state took in this case and permitting resentencing like the one the Arizona Supreme Court ordered in the first Rumsey opinion is therefore consistent with, and perhaps necessary to, the overall goals of the Arizona sentencing scheme and those of other states similar to it. It does not seem reasonable that the double jeopardy clause was intended to preclude states from constructing such systems.

CONCLUSION

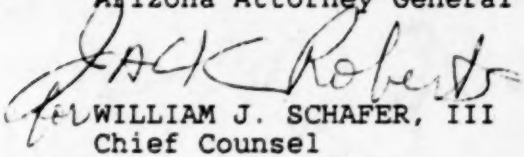
The life sentence imposed upon Rumsey was erroneous. The facts presented by the state at the initial sentence proved

an aggravating circumstance, that the murder was for pecuniary gain; but the trial court erroneously interpreted that circumstance to apply to hired killers only and imposed a life sentence. Where the state has proved its case in the trial court, and the life sentence imposed is the result of a legal error by the trial court, the state should be permitted to appeal. Bullington v. Missouri does not preclude an appeal by the State of Arizona from Rumsey's life sentence and a resentencing because Arizona's death penalty sentencing procedure is not as adversarial as Missouri's and Arizona's procedure would not give the state a second chance to convince the sentencer of the state's view of the facts. For these reasons the Court should grant review of the opinion

of the Arizona Supreme Court holding that the double jeopardy clause prevented a resentencing of Rumsey.

Respectfully submitted,

ROBERT K. CORBIN
Arizona Attorney General



for WILLIAM J. SCHAFER, III
Chief Counsel
Criminal Division

(2271D)

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

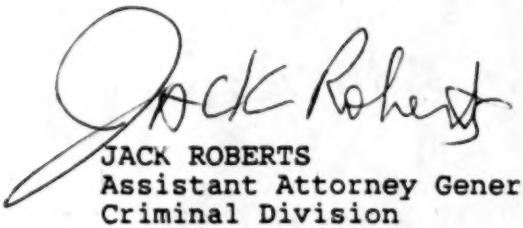
JACK ROBERTS, a member of the Bar of this Court, being first duly sworn, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon JAMES R. RUMMAGE, Attorney for Dennis Wayne Rumsey, at 132 South Central, Second Floor, Phoenix, Arizona 85003 by depositing the same in the United States Mail, with first class postage prepaid.

Additionally, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General,

Department of Justice, Washington, D.C.

20530.



JACK ROBERTS
Assistant Attorney General
Criminal Division
1275 West Washington
Phoenix, Arizona 85007

SUBSCRIBED AND SWORN TO before me this

10th day of August, 1983.



NOTARY PUBLIC

My Commission Expires
June 2, 1987

APPENDIX

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Opinion of the Arizona Supreme Court

STATE OF ARIZONA,
Appellee,

-vs-

DENNIS WAYNE RUMSEY,
Appellant.

Supreme Court No. 5042-2
Appeal from the Superior Court
of Maricopa County
Cause No. CR-109802
Filed: April 14, 1983
S. Alan Cook, Clerk

FELDMAN, Justice:

OPINION

Defendant was convicted of first degree murder, a violation of A.R.S. § 13-1105, and of armed robbery, a violation of A.R.S. § 13-1904. He was originally sentenced to life imprisonment for the murder and 21 years imprisonment for the robbery. On appeal, the murder sentence was vacated and the matter remanded for resentencing. State v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981). Following a new sentencing hearing, the death penalty was imposed. In the present appeal, defendant contends that he was twice put

in jeopardy by imposition of the death penalty after a prior sentence of life imprisonment, thus violating the fifth amendment of the Constitution of the United States as applied to the states by the fourteenth amendment.[1] Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. § 13-4031.

FACTS

On December 6, 1979, defendant was charged by information with armed robbery and first degree murder of George Joseph Koslosky. A jury convicted defendant of all charges. The facts surrounding the robbery are set forth in State v. Rumsey, supra. As required by A.R.S. § 13-703, a sentencing hearing was held after conviction on the murder charge. At the original sentencing hearing the State presented nothing more than the evidence which had been produced at the trial. The only defense witness was the foreman of the jury that had convicted defendant, who testified that the conviction had been based upon the felony murder rule rather than a finding of premeditation. The State contended that the trial evidence had established the aggravating circumstances which are specified in A.R.S. § 13-703(F)(3), (5) and (6).

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1. "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const., amend. V.

Defendant argued the existence of a number of mitigating circumstances, including lack of premeditation, conviction by means of the felony murder rule, youth (defendant was 19), and diminished capacity to conform his conduct to the law because of alcohol and drug consumption.

After hearing arguments, the court took the matter under advisement and on July 7, 1980, filed its special verdict, finding that there were no aggravating circumstances. The court specifically found that although there had been a risk of death to the person with the defendant at the time of the killing, that risk was not grave enough to be considered an aggravating circumstance. (A.R.S. § 13-703(F)(3).) It found that the pecuniary gain aggravating circumstance (Id. subsec. (5)) did not apply to felony-murder during a robbery, but only to "contract killing" situations. The court further found the murder had not been committed in an especially heinous, cruel or depraved manner. (Id. subsec. (6)) Finally, the trial judge found that there had been no mitigating circumstances. In light of these findings, the statute did not permit the court to impose the death sentence. (§ 13-703(E).) Accordingly, defendant was sentenced to imprisonment for life without possibility of parole for 25 years for the murder conviction. He was also sentenced to a consecutive term of 21 years for the robbery.

Defendant appealed, claiming that the sentences violated A.R.S. § 13-116, which

prohibits consecutive sentencing for a single act or omission even though that act or omission may be punishable in different ways by different statutes. After defendant had perfected his appeal, the State filed a cross-appeal under A.R.S. § 13-4032(4), which permits appeal by the state from "[a] ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment." The State contended on its cross-appeal that the trial court erred in holding that the pecuniary gain aggravating circumstance[2] applied only to a "murder for hire" situation. State v. Rumsey, 130 Ariz. at 431, 636 P.2d at 1213. Indeed, in a case decided only three weeks after defendant was sentenced to life imprisonment, this court held that the aggravating circumstance in question does apply where the killing is in furtherance of theft or robbery. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).[3] In deciding defendant's first appeal, we therefore held that the judge "erred in

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2. "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5).

3. Justice Gordon, specially concurring, argued that the pecuniary gain aggravating circumstance was applicable only to a hired killer situation. State v. Clark, 126 Ariz. at 437, 616 P.2d at 897.

holding as a matter of law that [he] could not find as an aggravating circumstance that the murder was for monetary gain." State v. Rumsey, 130 Ariz. at 431-32, 636 P.2d at 1213-14. Because the trial judge made a legal error in interpreting the statute, we set aside the sentence of life imprisonment amd (sic) remanded for redetermination of aggravating and mitigating circumstances and resentencing. Id. at 432, 636 P.2d at 1214.[4]

On remand the trial court held another sentencing hearing under A.R.S. § 13-703 and filed a new special verdict. The court found "that the hope of financial gain was a cause of the murder" and that A.R.S. § 13-703(F)(5) was applicable because the "defendant committed the offense . . . in expectation . . . of pecuniary [gain]." The trial court again found that there were no mitigating circumstances sufficiently substantial to call for leniency. Having found one aggravating circumstance and no

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4. Justice Struckmeyer dissented, stating that where "punishment of life imrisonment has been imposed for murder, permitting a possible resentence of death if the State cross-appeals will have such a chilling effect as to cause a defendant with a life sentence to forego a meritorious appeal." State v. Rumsey, 130 Ariz. at 432, 636 P.2d at 1214. Defendant also raises that argument in this appeal. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

mitigating circumstance, the trial court followed the statutory mandate and imposed the sentence of death.

DOUBLE JEOPARDY

Defendant argues that having first been sentenced to imprisonment for life, he was implicitly "acquitted" of death and that the subsequent imposition of the death penalty was prohibited by the fifth amendment proscription against double jeopardy.

The Supreme Court of the United States has summarized the protection afforded by the double jeopardy clause as follows:

> That guarantee has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

United States v. DiFrancesco, ___U.S.___, ___, 101 S.Ct. 426, 433, ___L.Ed.2d___ (1980) (quoting North Carolina v. Pearce, 395 U.S. at 717, 89 S.Ct. at 2076).

The prohibition against being twice put in jeopardy:

> was designed to protect an individual from being subjected to the hazards of trial and possible

> conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an indiviudal for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).

The bar against retrial is not absolute. A defendant who succeeds in overturning his conviction may be retried because the reversal on appeal nullifies the original conviction and wipes the slate clean. Bullington v. Missouri, ___ U.S.____, ____, 101 S.Ct. 1852, 1859-60, ____L.Ed.2d____ (1981). If, however, the defendant has been acquitted or the conviction reversed on the ground the evidence was insufficient to convict, the principles underlying the double jeopardy clause demand that he not be retried.

> "The constitutional protection against double jeopardy unequivocally prohibits a second

> trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried . . . . . If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair."

DiFrancesco, supra, (citations omitted) (quoting Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 829, 54 L.Ed.2d 717 (1978)).

The Supreme Court considered the application of the double jeopardy clause to sentencing in both United States v. DiFrancesco, supra, and Bullington v. Missouri, supra. In DiFrancesco, the Court held that the prohibition against double jeopardy was not violated by a provision in the Organized Crime Control Act of 1970 (18 U.S.C. § 3576) which gave the United States the right to appeal a sentence imposed upon a "dangerous special offender." The government had sought review of the sentence imposed on DiFrancesco, claiming that the district court had abused its discretion by imposing sentences that were too lenient. The Court held that the sentencing was not equivalent to trial, so that neither the statutory procedure nor DiFrancesco's prospective resentencing to a longer term of imprisonment was prohibited by the double jeopardy provisions of the fifth amendment. Basic to the DiFrancesco

decision is the concept that the double jeopardy clause was intended to provide protection only against successive trials. It is only when the defendant has been tried and acquitted -- or finally convicted -- that he may not again be put on trial for the same offense. The court held that ordinary sentencing procedures are not similar to "trial"; imposition of a particular sentence is not an implicit acquittal of more serious punishment[5] and there is, therefore, no consequent prohibition to resentencing with imposition of a more severe punishment.

In Bullington, the Supreme Court considered the bifurcated system for imposition of capital punishment. Bullington had been convicted of first degree murder and in a separate sentencing procedure the jury had fixed the punishment at imprisonment for life. Bullington sought and was granted a new trial for error involving jury

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5. Cf. Green v. United States, supra. Defendant had been charged with and tried for first degree murder. He was convicted of second degree murder, appealed, and that conviction was reversed. The court held that defendant could not be retried for first degree murder because he had been tried on that charge and the jury's conviction of second degree murder evidenced a refusal to convict of first degree and a consequent "implicit acquittal" of the higher offense. Id. at 190, 78 S.Ct. at 225.

composition. The prosecution gave notice on remand that it intended again to seek the death penalty. The Missouri Supreme Court held the procedure was permissible, but on certiorari the United States Supreme Court held that Missouri's sentencing procedure for capital cases was equivalent to a trial, so that the State's attempt to impose the death penalty at retrial was prohibited by the double jeopardy clause.

Before adoption of bifurcated systems, the Court had held that the double jeopardy clause did not prohibit imposition of the death penalty at retrial after the defendant had been convicted, sentenced to life, and had succeeded in having his original conviction set aside. See Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); Stroud v. United States, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919).

In deciding Bullington, however, the Court noted that although the imposition of a particular sentence usually is not regarded as trial and acquittal of any more severe sentence that could have been imposed, the imposition of a life sentence on Bullington following the sentence hearing at his first trial had effectively acquitted him of whatever was required or necessary to impose the death sentence. The Court distinguished the prior resentencing cases by noting that, unlike the Missouri procedure, the sentencing procedures followed in

Chaffin, Stroud and DiFrancesco did not have the "hallmarks" of a trial on guilt or innocence. Bullington, ____U.S. at ____, 101 S.Ct. at 1858. The essence of the Bullington decision is that double jeopardy imparts finality to a sentence "whenever the basis for sentencing is a situation in which the jury agrees or an appellate court decides that the prosecution has not proved its case." Bullington, ____U.S. at ____, 101 S.Ct. at 1860.

In distinguishing between DiFrancesco and Bullington, the Court cited the following factors as being of importance in determining whether the procedure is a sentencing or a trial within the meaning of the double jeopardy clause: (1) In ordinary sentencing situations, there are no standards set for the court and, thus, no issues of fact for it to resolve in imposing sentence. The discretion of the judge is therefore free of "substantive control or guidance." (2) The judge has power to select from a range of possible sentences; within the statutory limits his authority is broad. (3) The court's judgment is usually based upon matters developed outside the courtroom and the sentencing procedure is essentially nonadversarial in nature. (4) There is no need for findings or conclusions to be placed on the record in order to establish the reason for the sentence chosen. Id. at ____, 101 S.Ct. at 1860-61.

The Court then compared these factors to the procedure followed in Missouri.

After conviction in Missouri, the same jury was reconvened to determine the sentence and explicitly required to determine whether the prosecution had "proved its case." Id. at ____, 101 S.Ct. at 1860-61. Unlike the sentencing cases, a separate sentence hearing was mandated where additional facts were required to be proved in order to justify the particular sentence with explicit standards enacted to guide the jury's discretion. Conceding that DiFrancesco had also involved a bifurcated proceeding which required the government to prove an additional fact (that the defendant was a "dangerous special offender") in order to justify more severe punishment, the Court further distinguished DiFrancesco, stating that it:

> [was] not a de novo proceeding that gives the Government the opportunity to convince a second factfinder of its view of the facts. Moreover, the choice presented to the federal judge under [the DiFrancesco statute] is far broader than that faced by the state jury at the present petitioner's trial. Bullington's Missouri jury was given . . . only two choices, death or life imprisonment. On the other hand, if the Federal Government proves that a person convicted of a felony is a dangerous special offender, the judge may sentence that person to "an appropriate term not to exceed twenty-five years and not disproportionate in severity to the

> maximum term otherwise authorized for such felony." Finally, although the statute requires the Government to prove the additional fact that the defendant is a "dangerous special offender", it need do so only by a preponderance of the evidence. This stands in contrast to the reasonable doubt standards of the Missouri statute, the same standard required to be used at the trial on the issue of guilt or innocence.

Id. at ____, 101 S.Ct. at 1859 (citations and footnotes omitted). The Court held "[b]ecause the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him with respect to the death penalty, at his retrial." Id. at ____, 101 S.Ct. at 1862.

APPLICATION TO ARIZONA PROCEDURE

A review of Arizona procedure reveals its dissimilarity to the sentencing cases and its similarity to the Bullington sentencing procedure. In Arizona, as in Missouri, a special procedure is applicable to capital cases. The resemblance of this procedure to trial is apparent on examination of A.R.S. § 13-703. Under this statute, if the defendant is found guilty of first degree murder, the judge who presided at the trial is required to conduct a separate sentencing hearing to determine the

existence of aggravating or mitigating circumstances. While the court may consider material contained in a presentence report, evidence relevant to aggravating or mitigating circumstances is presented at the hearing. Evidence of aggravating circumstances is governed by the rules of evidence at criminal trials.[6] All evidence which was admitted at the trial may be considered by the judge on aggravation or mitigation without reintroduction. The parties are entitled to rebut and to argue. The burden of establishing the existence of mitigating circumstances is on the defendant. The Arizona statute further requires that the court return a special verdict setting forth its findings of aggravating and mitigating circumstances. The court is not without standards to guide it. The aggravating circumstances which may be considered are specified in § 13-703(F). Specific mitigating circumstances are contained in § 13-703(G), which also permits consideration of any additional factor relevant in determining whether to impose a sentence less than death, including "any aspect of the defendant's character, propensities or record and any of the circumstances of the offense." Nor does Arizona procedure give the court broad discretion in selecting the punishment. There are but two alternatives -- life

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6. Mitigating evidence may be admitted even if not in compliance with the Rules of Evidence. A.R.S. § 13-703(C).

imprisonment or death. Specific instructions are given with regard to the final conclusions to be reached. If there are aggravating circumstances found, then the court "shall impose a sentence of death" provided "there are no mitigating circumstances sufficiently substantial to call for leniency."

Comparing the procedure required by the Arizona statute to the rationale adopted by the Supreme Court in both DiFrancesco and Bullington, we can only conclude that, like Missouri, Arizona procedure so closely resembles a trial that the following language is applicable:

> By enacting a capital sentencing procedure that resembles and is like a trial on the issue of guilt or innocence, . . . [the state] explicitly requires the [judge] to determine whether the prosecution has "provewd its case." . . . [T]he sentence of life imprisonment which petitioner received at his first trial meant that "the [judge] has already acquitted the defendant of whatever was necessary to impose the death sentence."

Bullington v. Missouri, ____U.S. at ____, 101 S.Ct. at 1861. If the defendant, like Bullington, has been acquitted of death because the State failed to prove its case, then that verdict, like a verdict of acquittal on the issue of innocence, is final. Id. at ____, 101 S.Ct. at 1862.

The State advances various arguments to support its contention that the Bullington

analysis should not be applied to the Arizona sentencing procedure. The first of these arguments focuses on the differences between the Arizona sentencing procedure and that followed in Missouri. One difference is that the Missouri statute expressly sets forth the standard of proof required -- beyond a reasonable doubt. The Arizona statute does not, but we have already held that "[t]he statute does not indicate the degree of certainty with which these [aggravating] circumstances must be established, but we have always assumed, and we so hold now, that the state must prove the existence of aggravating circumstances beyond a reasonable doubt." State v. Jordan, 126 Ariz. 283, 286, 614 P.2d 825, 828 (1980).

Another difference is that although the Arizona statute requires proof of aggravating circumstances to conform to the rules of evidence, mitigating evidence need not. We note, however, that admission of three of the four categories[7] of evidence considered at sentencing are governed by the rules of evidence. We do not believe the introduction of non-conforming mitigating evidence at the sentencing hearing

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7. The four types of evidence considered at sentencing are evidence of aggravating and mitigating circumstances which was admitted at trial and aggravating and mitigating evidence admitted at the sentence hearing. The first two categories may be considered without being reintroduced. See A.R.S. § 13-703(C).

significantly distinguishes the Arizona procedure from that discussed in Bullington.

The major difference between Missouri and Arizona procedure is that the Arizona statute provides that the judge rather than the jury hear the evidence, apply thelaw and decide upon the punishment. However, the analysis in Bullington focused on the procedures by which sentence was determined rather than the identity of the sentencer. The fact that the trial judge, rather than the jury, is the sentencer does not necessarily make that hearing any less like a trial. We have already noted that the Arizona procedure is not similar to that followed at DiFrancesco-type sentencing, where the judge is free to impose from a wide range of choices and need not express or articulate the specific reasons for the decision. The Arizona statute gives the judge only two choices, life or death, and requires that the "court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the [aggravating and mitigating] circumstances . . . ." § 13-703(D). In returning the special verdict in the case at bench, the procedure was similar to that followed in a bench trial where findings of fact and conclusions of law have been requested.[8] We conclude that

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8. For instance, one of the aggravating circumstances advanced by the State at the first sentence hearing was that the defendant had created a grave

under the Bullington analysis, the "hearing" is effectively a "trial" to the bench.

For purposes of double jeopardy, it has never made a difference whether a case was tried before a judge or a jury. See United States v. Morrison, 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976), in which the Supreme Court stated: "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply

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risk of death to his alleged accomplice, Kimberly Holmes. In returning its special verdict, the trial court found that although there had been a risk of death to Holmes, it was not a "grave risk" as required by the statute and therefore the aggravating circumstance listed in A.R.S. § 13-703(F)(3) was legally inapplicable. Obviously, this was a finding of fact and a conclusion of law drawn from it. Similarly, the State had claimed that the murder had been committed in an especially heinous, cruel or depraved manner. § 13-703(F)(6). The court found under the facts that the murder had not been especially heinous, cruel or depraved and therefore concluded that the second of the aggravating circumstances advanced by the State was legally inapplicable. In considering the applicability of the pecuniary gain aggravating circumstance, § 13-703(F)(5), the court held that the factor was inapplicable as a matter of law.

to cases tried to a judge." Id. at 3, 97 S.Ct. at 26 (quoting United States v. Jenkins, 420 U.S. 358, 365, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250 (1975)).[9]

The State next argues that the original sentence hearing, review, resentencing and final review by this court are all part of a single procedure, so that defendant's "trial" is not concluded until the correct penalty is finally determined by this court. It is true that we have held that in all cases where the death penalty has been imposed[10] we will conduct an independent review of aggravating and mitigating evidence and will decide independently whether the death sentence

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9. It has been intimated that the Arizona procedure is not similar to a trial because only the judge is presiding. Knapp v. Cardwell, 667 F.2d 1253, 1265 (9th Cir. 1981), cert. denied, ____U.S.____, 103 S.Ct. 473, ___ L.Ed.2d____ (1982). In our view, this statement is contrary to United States v. Morrison, supra.

10. Such cases are automatically appealed to this court under Ariz.R.Crim.P. 31.2(b), 17 A.R.S. However, automatic appeal is required only if defendant is sentenced to death. Id. No appeal is required if life imprisonment is imposed. The state is not permitted an appeal unless the defendant has appealed. A.R.S. §13-4032(4). This, of course, is inconsistent with the state's "single procedure" argument.

should be imposed in each case. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). We also conduct a review of proportionality in each case to consider "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id.

There is support for the argument that the division of a criminal action into two parts of a single proceeding is not prohibited by the double jeopardy clause. In Swisher v. Brady, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978), the Court held that the Maryland juvenile procedure did not violate the double jeopardy clause. That procedure involved a hearing before a master appointed by the juvenile judge, followed by the juvenile judge's review of the master's recommendations. The juvenile court had power to accept the master's recommendations or make a de novo determination. Swisher is inapposite to the capital punishment procedure in Arizona. Sentencing is not commenced in this court and referred by us to a master; it is commenced in the superior court and appealed to us as a reviewing court. The superior court judge does not merely make recommendations for our acceptance or rejection; he presides at a hearing, takes evidence, makes findings and conclusions in the form of a special verdict and enters judgment which is then appealed to this court.

While we have an independent duty of review, we perform it as an appellate

court, not as a trial court. We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty.[11] Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." State v. Richmond, 114 Ariz. at 196, 560 P.2d at 51. In capital cases "we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances . . .[to] determine for ourselves if the latter outweigh the former . . . ." Id. (citations omitted). Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." Id. The purpose of our review is well stated in the Supreme Court's opinion regarding the Florida statute, which is similar to ours.

> That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and

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11. There is considerable doubt that we could hold to the contrary. The double jeopardy clause implies that defendant has a right to have his hearing concluded, subject to appeal, before a single tribunal. See DiFrancesco, ____U.S. at ____, 101 S.Ct. at 432-33.

> objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law.

Proffitt v. Florida, 428 U.S. 242, 259-60, 96 S.Ct. 2960, 2970, 49 L.Ed.2d 913, (1976) (emphasis supplied).

We hold, therefore, that the Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by the utilization of this court's appellate process to make a conscientious review on statewide basis in order to assure rationality and "evenhanded operation" in the imposition of the death penalty. This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life.

The state next argues that the double jeopardy problem could be obviated if we were to hold that where the trial court has erred on a matter of law in failing to impose the death sentence, the case may be remanded for resentencing on the condition that the State not be allowed to introduce new contentions or evidence with regard to

aggravating circumstances. There are several flaws in this argument. First, we cannot rewrite the statute with all of its requirements which, presumptively at least, apply to both the first and second hearing. Next, we have already held in State v. Gretzler (Gretzler II), ___ Ariz.____, ____P.2d____ (filed January 6, 1983), that on remand for resentencing after the initial imposition of the death sentence, the state may present evidence regarding aggravating circumstances which were neither argued nor advanced at the first sentencing hearing.[12] Third, and most important, in holding that the Missouri procedure did violate the double jeopardy clause, the United States Supreme Court stated as follows:

> [O]ur decison today does not at all depend upon the State's announced intention to rely only upon the same aggravating circumstances it sought to prove at petitioner's first trial or upon its statement that it would introduce no new evidence in support of its contention that petitioner deserves the death penalty. Having received

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12. Remand for a second sentence hearing in Gretzler did not violate the double jeopardy clause because Gretzler had received the death penalty at his original sentencing and there was, therefore, no implied acquittal as in the case at bench. Knapp v. Cardwell, 667 F.2d at 1264.

> "one fair opportunity to offer whatever proof it could assemble," the State is not entitled to another.

Bullington, ____U.S. at ____, 101 S.Ct. at 1861-62 (quoting Burks v. United States, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978)).

Finally, the State argues that because the first sentencing was legally erroneous, resentence to the death penalty did not put defendant twice in jeopardy, but merely corrected the legal error made at the first hearing and imposed the punishment which the law always had required. This court and the Supreme Court have rejected that argument. In speaking of the effect of a legally erroneous acquittal by directed verdict, this court stated:

> An acquittal results after a consideration of the facts and a finding of innocence of the charge.
>
> The law attaches particular importance to an acquittal. In a historical perspective, "Perhaps the most fundamental rule . . . of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy and thereby violating the Constitution.'" Likewise, this court attaches particular importance to acquittals. We have

> consistently ruled that a defendant once acquitted of a particular crime, is protected from further prosecution by the prohibition of double jeopardy. The state is not authorized to appeal from a judgment of acquittal.
>
> The state contends that the motion for acquittal was granted in error based on the trial judge's misinterpretation of [the statute]. Even if the state's position is correct, the defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation.

Rolph v. City Court of the City of Mesa, 127 Ariz. 155, 158, 618 P.2d 1081, 1084 (1980) (citations omitted); see also United States v. Scott, 437 U.S. 82, 91, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65 (1978).

We conclude that Arizona's capital sentencing procedure is not significantly distinguishable from the Missouri procedure considered in Bullington, supra. Under that case, therefore, the sentence of life imposed by the trial judge was a finding that the state had failed to prove whatever was necessary for conviction of death and was an implicit acquittal entitled to finality. We hold therefore, that the sentence to death after the second hearing violated the double jeopardy provisions of the fifth amendment to the United States Constitution as applied to the State of Arizona by the fourteenth amendment. Bullington v. Missouri, supra.

This holding makes it unnecessary to discuss the other contentions raised by defendant. Therefore, it is ordered that the defendant's sentence be reduced from death to imprisonment for life without possibility of parole for 25 years from the date on which he was originally sentenced. The robbery sentence of 21 years of imprisonment is to be served consecutively to the term of life imprisonment.

STANLEY G. FELDMAN, Justice

CONCURRING

WILLIAM A. HOLOHAN, Chief Justice
FRANK X. GORDON, JR., Vice Chief Justice
JACK D. H. HAYS, Justice
JAMES DUKE CAMERON, Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Order Denying Motion for Rehearing

STATE OF ARIZONA,

Appellee,

-vs-

DENNIS WAYNE RUMSEY,

Appellant.

Supreme Court No. 5042-2
Maricopa County Cause No. CR-109802
Filed: June 14, 1983

The following action was taken by the Supreme Court of the State of Arizona on June 14, 1983, in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Reducing Death Sentence to Life Imprisonment enclosed.

APPENDIX C

636 P.2d 1209

STATE OF ARIZONA,
Appellee-Cross-Appellant,
v.
DENNIS WAYNE RUMSEY,
Appellant-Cross-Appellee.

No. 5042

Supreme Court of Arizona,
In Banc.
Nov. 4, 1981.
Rehearing Denied Dec. 8, 1981.

Defendant was convicted before the Superior Court, Maricopa County, Cause No. CR-109802, Rufus C. Coulter, J., of first-degree murder and armed robbery and was given consecutive sentences, and he appealed. The Supreme Court, Cameron, J., held that: (1) consecutive sentences did not violate the multiple punishment statute; (2) for murder for pecuniary gain to be an aggravating circumstance warranting the death penalty the facts need not suggest a "contract-type" murder or murder "for hire" situation; and (3) since trial judge misinterpreted the murder for pecuniary gain aggravating circumstance, remand for resentencing was required.

Conviction affirmed; remanded for resentencing on murder conviction.

Gordon, J., filed specially concurring statement.

Struckmeyer, C.J., filed dissenting opinion.

Robert K. Corbin, Atty. Gen. by William J. Schafer, III, and Jessica Gifford, Asst. Attys. Gen., Phoenix, for appellee-cross-appellant.

Ross P. Lee, Maricopa County Public Defender by Charles R. Krull, Deputy Public Defender, Phoenix, for appellant-cross-appellee.

CAMERON, Justice.

Defendant, Dennis Wayne Rumsey, was convicted by a jury on 6 June 1980 of first degree murder in violation of A.R.S. § 13-1105, and armed robbery in violation of A.R.S. § 13-1904. He was adjudged guilty and sentenced to life imprisonment without possibility of parole for 25 years for the first degree murder conviction and 21 years for the armed robbery conviction. A.R.S. §§ 13-701, 13-702, and 13-604. The terms of the sentences were to run consecutively. A.R.S. § 13-708. Defendant now appeals the consecutive nature of his sentences. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4035.

We must answer the following questions on appeal:

1. Does the imposition of consecutive sentences in this instance violate Arizona's multiple punishment statute?

2. Does the imposition of consecutive sentences violate the double jeopardy clause of the United States Constitution?

3. Did the trial court err in imposing life imprisonment rather than the death sentence for the murder conviction?

The facts necessary for a determination of these issues are as follows. On 16 October 1979, a badly decomposed body of a white male was discovered on the desert alongside Interstate 10, approximately 20 miles outside of Phoenix, Arizona. The corpse carried no identification, and a subsequent autopsy revealed that the victim died of two gunshot wounds to the chest. Through fingerprint analysis and dental examination, the victim was later identified as one George Koslosky.

On or about 5 November 1979, the Phoenix Police Department was notified by the Indiana State Police that a girl by the name of Kimberly Holmes had come forward as a witness to a murder in the State of Arizona. Through an interview with Kimberly Holmes, the police arrested the defendant in Las Vegas, Nevada, at his parental home and he was charged with the murder and robbery of George Koslosky.

At trial, Kimberly Holmes testified that in October of 1979 she and defendant were

hitchhiking from Indiana to the home of the defendant's parents in Las Vegas. In New Mexico or Texas, they were picked up by the victim, George Koslosky. When they reached Phoenix, the defendant and the victim went into a store to buy some beer. When the defendant returned, he told Kim that the victim had over $300 in his wallet and that he was going to rob him. Elsewhere in Phoenix, they stopped at a restaurant where the victim bought food for them. The defendant again told Kim of his plans to rob Koslosky. When they left Phoenix, defendant was driving the vehicle and the victim was sleeping in the back. After driving for approximately 45 minutes, defendant pulled over to the side of the road and told Kim, "I'm going to do it now." Defendant then woke the victim and ordered him at gunpoint to empty his pockets and to get into the trunk. The victim refused, saying he would "smother" in the trunk. The defendant fired one warning shot and repeated his demands. When the victim refused, the defendant shot the victim twice and he fell to the ground. The defendant then dragged the victim off the road and Kim testified that she then heard a third shot. Prior to leaving the scene in the victim's car, defendant threw some money at Kim and told her to count it. They then proceeded to Riverside, California, and then on to Las Vegas. Shortly thereafter, Kim returned to Indiana where she notified the authorities of the incident.

William Rumsey, defendant's brother, testified that in October, 1979, his

brother came back to Las Vegas. At that time, defendant told him that he had shot a man in Arizona and did not know if he had killed him or not. While they were speaking, defendant showed his brother a wallet and a watch that were later identified as having belonged to the victim, George Koslosky.

When testifying in his own behalf, defendant denied even discussing the robbery of George Koslosky with Kimberly Holmes. Defendant testified that the victim was driving the car when they left Phoenix and that it was he who went into the back seat where he passed out from drinking and using narcotics. When he awoke, it was Kim who was driving the car and she was shaking and crying. Defendant said that at that time, Kim admitted killing the victim because he had tried something with her. Defendant admitted that upon his return to Las Vegas, he told his brother that it was he who shot a man in Arizona, but that this was done to cover-up for Kimberly Holmes and to protect her from being arrested.

MULTIPLE PUNISHMENT

Defendant contends that the sentence imposed by the trial court is in violation of Arizona's multiple punishment statute which reads as follows:

> "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent. * * *" A.R.S. § 13-116.

Under a previous statute with slightly different language, we have held that a defendant convicted for murder under the felony-murder rule may receive two sentences when the underlying felony and the homicide were two separate and distinct offenses. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979); State v. Minifield, 110 Ariz. 599, 522 P.2d 25 (1974).

In State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971), we adopted the "identical elements" test for determining whether the proscription of Arizona's multiple punishment statute applies to a particular case. Under that test, the court must eliminate the evidence supporting the elements of one charge and determine whether the remaining evidence supports the elements of the other charge.

The elements of first degree murder are: (1) knowingly; (2) causing the death of another person; (3) with premeditation. A.R.S. § 13-1105. Armed robbery is: (1) the taking of any property; (2) of another; (3) from his person or immediate presence; (4) against his will; (5) by using or threatening to use force; (6) with the intent either to coerce surrender of the property or to prevent resistance to such person taking or retaining property; (7) where the perpetrator is armed with a deadly weapon or uses or threatens to use a deadly weapon or dangerous instrumentality. A.R.S. §§ 13-1902 and 13-1904.

A.R.S. § 13-1902 reads:

"A person commits robbery if in the course of taking any property of another * * * such person threatens or uses force * * *" (emphasis added)

In a case wherein the defendant shot and killed a taxicab driver by a bullet in the back of the head after which he took the victim's night's receipts we stated in setting aside the consecutive sentences:

"It is apparent that the elimination of the evidence supporting the elements of first degree murder does not leave sufficient evidence to support the armed robbery charge. Although the first five elements of robbery are supported by the remaining facts, the sixth element 'by means of force or fear' is not supported. This evidence is necessary to support the first two elements of the murder charge: the unlawful killing of a human being. Under the peculiar facts of our instant case, the taxicab driver was shot in the head from behind, apparently with no knowledge of what was about to take place. This shooting was the only force available to support the subsequent acts which might otherwise be characterized as robbery. * * * Accordingly, the robbery conviction and sentence are set aside." State v. Ferguson, 119 Ariz. 55, 61, 579 P.2d 559, 565 (1978).

We do not find that State v. Ferguson, supra, is applicable. In the instant case, the defendant demanded the victim's wallet and threatened him with a gun prior to shooting him. Even though the victim's wallet was not taken until after the victim was shot and presumably dead, the acts which constituted the robbery were separate and apart from the acts which constituted the murder. The fatal shooting constituted first degree murder independent of the armed robbery. Under the facts of this case, we hold that the intervening crime of murder does not preclude a conviction of armed robbery as well as murder, and the trial court was correct in imposing consecutive sentences for armed robbery and murder.

DOUBLE JEOPARDY

Defendant also contends that his consecutive sentences violate the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Defendant relies on the United States Supreme Court case of Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). Whalen was decided on the basis of a District of Columbia statute, and the United States Supreme Court, interpreting that statute, concluded that Congress did not intend to allow the crimes of rape and murder in the course of rape to be punishable by consecutive sentences. The Court in Whalen made it clear that Congress could have provided for a different sentencing scheme. Arizona has such a scheme and

specifically permits the imposition of consecutive sentences. A.R.S. § 13-708. We do not believe Whalen is applicable. We find no double jeopardy violation.

FAILURE TO IMPOSE THE DEATH PENALTY

Before sentencing, the trial court made the findings required by the statute, A.R.S. § 13-703, as to mitigating and aggravating factors. The trial court specifically found:

> "5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> In this regard, the Court does not agree with the State's interpretatin of A.R.S. 13-703(F)(5) and State v. Madsen filed March 26, 1980. The Court believes that when A.R.S. 13-703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc."

The court further stated it found no aggravating or mitigating circumstances to exist and then sentenced the defendant to life imprisonment rather than death.

The State cross-appealed pursuant to A.R.S. § 13-4032(4) which states:

"An appeal may be taken by the state from:

* * * * * *

"4. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment."

and contends that the trial court erred in interpreting A.R.S. § 13-703(F)(5) to mean that for murder for pecuniary gain to be an aggravating circumstance, the facts must suggest a "contract-type" murder or murder "for hire" situation. The trial court based its conclusion on language appearing in State v. Madsen, 125 Ariz. 346, 609 P.2d 1046, cert. denied 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). In Madsen, the trial court held that the receipt of proceeds from an insurance policy on the victim was an aggravating circumstance pursuant to the monetary gain portion of the statute. We disagreed stating:

"The mere existence of the policy and the receipt of the proceeds does not establish that the killing was done in expectation of the profit from the insurance policy, nor does defendant's after-the-fact statement regarding the collecting of insurance money indicate that he committed the murder for the purpose of receiving the insurance proceeds. A.R.S. § 13-454(E)(5) requires that the murder must have been committed for the

consideration of financial gain. To comply with the statute, the receipt of the money must be a cause of the murder, not a result of the murder. We do not believe that there was sufficient evidence from which it could be found that there was financial motivation on defendant's part for the murder. From an independent examination of the record as required by Richmond, supra, we do not believe this aggravating circumstance has been shown." 125 Ariz. at 353, 609 P.2d at 1053.

In the instant case, the hope of financial gain was a cause of the murder, not merely a result.

Any uncertainty regarding the interpretation of Madsen, supra, however, was dispelled, three months after defendant was sentenced, when we held that A.R.S. § 13-703(F)(5) was not limited to "hired gun" situations and that a trial court could properly find that theft committed in the course of a murder is an aggravating circumstance pursuant to subsection (F)(5) of A.R.S. § 13-703. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). The trial court, therefore, erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain.

Because the trial judge misinterpreted the statute and our opinion in Madsen,

supra, the sentence of life imprisonment previously imposed will have to be set aside and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing. The sentence for armed robbery is not affected by this opinion.

Judgment of guilt and sentence for armed robbery affirmed. The judgment of guilt for first degree murder is affirmed, the sentence is vacated, and the matter is remanded for resentencing pursuant to this opinion.

HOLOHAN, V.C.J., and HAYS, J., concur.

GORDON, Justice, specially concurring.

I must specially concur in light of my dissent in State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980).

STRUCKMEYER, Chief Justice, dissenting.

I dissent to that portion of this decision which sets aside the sentence of life imprisonment previously imposed and remands for resentencing.

It is my opinion that where, as here, the punishment of life imprisonment has been imposed for murder, permitting a possible resentence of death if the State cross-appeals will have such a chilling effect as to cause a defendant with a life sentence to forego a meritorious appeal. I agree with Justice Stewart, who in North Carolina v. Pearce, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969),

quoted from Worcester v. Comm. of Internal Revenue, 370 F.2d 713, 718 (1st Cir. 1966):

> "[I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."

The judgment of conviction and sentence should be affirmed.

(2493D)

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NO. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARIZONA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 10, 1983
CERTIORARI GRANTED JANUARY 9, 1984

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The opinion of the Arizona Supreme Court ordering a resentencing may be found in Appendix "C", pages A28-40 of the Petition for Certiorari. The supreme court opinion holding that the death penalty was barred upon resentencing may be found in Appendix "A", pages A1-26 of the Petition for Certiorari.

Initial Sentencing Hearing
July 3, 1980

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS WAYNE RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

Reporters Transcript of Proceedings
Pages 1 through 31

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES

FOR THE STATE:

JEFFREY A. HOTHAM
DEPUTY COUNTY ATTORNEY

FOR THE DEFENDANT:

ARTHUR G. HAZELTON, JR.
DEPUTY PUBLIC DEFENDER [R.T. 2][1]

THE COURT: CR-109082 (sic), State versus

Dennis W. Rumsey.

This is the time set for the presentencing hearing.

Court has read and reviewed the presentence report on several occasions.

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1. R.T. is the reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

Court has also received a letter dated June 28, 1980 from the Defendant's mother. It's available to counsel prior to the hearing. And I understand the State has no evidence.

MR. HOTHAM: That's correct.

Your Honor, the State would like to argue, but the State has no further evidence other than the evidence submitted at trial.

THE COURT: Counsel.

MR. HAZELTON: Art Hazelton appearing for and with Mr. Rumsey, Your Honor. We have one witness we would like to present for the defense in mitigation.

THE COURT: You may proceed.

MR. HAZELTON: Call to the stand Mr. Leslie Bart Hock. [R.T. 3]

Leslie Bart Hock,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HAZELTON:

Q. Would you please state your name and occupation for the record?

A. Leslie Bart Hock, and I'm a project engineer with Sperry.

Q. Mr. Hock, were you selected to be a jury member in the trial that commenced on June 2nd, 1980 and proceeded through June 6th, 1980 here in this courtroom before Judge Coulter wherein Dennis Rumsey was tried on the charges of murder, first degree, and armed robbery?

A. Yes, sir, I was.

Q. And did you sit as a juror in the deliberations of the jury panel as a whole?

A. Yes, sir, I did.

Q. Were you selected foreman?

A. Yes.

Q. By the other members of the jury?

A. Yes, sir, I was.

Q. And during the deliberations of the jury, did you serve as a chair person for the conduct of the deliberations?

[R.T. 4]

A. Yes, sir.

Q. During the deliberations of the jury, were you provided copies of the instructions that were read to the jury by Judge Coulter?

A. Yes, sir.

Q. And were the instructions read by the jury and considered as to the two theories, the State's theories as to murder in the first degree by premeditation, and felony murder?

A. Yes, sir.

Q. Did the jury panel in their deliberations consider both of those instructions?

MR. HOTHAM: Objection -- strike that.

BY MR. HAZELTON:

Q. Did the jury consider both of those instructions?

A. Yes, sir.

Q. And I presume that the jury did enter a finding of murder, first degree is that correct?

A. We did, sir.

Q. Was that finding based on a unanimous vote as to murder, first degree, premeditation, based on that instruction, or on the felony murder instruction?

MR. HOTHAM: Objection, Your Honor. The State's position is that this question is improper impeachment of the jury's verdict.

We specifically spent a lot of time in chambers [R.T. 5] resolving the proper instructions to give to the jury about

this matter, and it was resolved that a special verdict in which the jury decided one way or the other whether it was premeditation or felony murder was not proper and it would be improper to have given that instruction, and since that was the Court's ruling and holding at the time, asking the foreman of the jury at this time what the theory of the jury was behind their conviction is improper impeachment of the jury's verdict.

THE COURT: Overruled.

BY MR. HAZELTON:

Q. Please answer.

A. Okay. I'm not sure of the question. We did reach a verdict of felony murder.

Q. And you rejected the theory of premeditation, is that correct?

A. Yes, sir, we did.

Q. Mr. Hock, if you were asked to make a recommendation to the judge regarding the sentence of Mr. Rumsey, knowing that the judge has the two options for first degree murder of life imprisonment or death, do you have an opinion or recommendation to the judge for sentencing?

A. Yes, sir.

Q. And what is that opinion?

MR. HOTHAM: Objection, Your Honor, I don't believe it's proper for this witness to testify as to what his opinion is, [R.T. 6] and it's the case law, and statutes in Arizona provide that the judge is to be the deciding person as far as what the penalty is to be given. I don't believe that it would be proper for him to make an opinion as to what would be appropriate in the matter.

It's certainly not something that opinion evidence is the right grounds for.

THE COURT: Overruled.

THE WITNESS: Yes, sir. My opinion, and most of the jury felt that it should be life.

MR. HAZELTON: Thank you very much, Mr. Hock.

I have no further questions.

CROSS-EXAMINATION

BY MR. HOTHAM:

Q. Thank you, Your Honor.

You say that most of the people on the jury felt it should be life. Does that mean there were people that felt death would be appropriate?

A. I couldn't say, sir. Those that expressed opinions, and that was not all of us.

Q. I see.

Let me read to you the statute in reference to the expectation of receiving something of pecuniary gain, which is a factor that the judge must determine whether there is an [R.T. 7] aggravating factor for death.

The statute says that death can be properly imposed if the defendant committed the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

Do you think that the State proved beyond a reasonable doubt that the defendant committed the offense in the expectation of the receipt of anything of pecuniary value?

MR. HAZELTON: Your Honor, I object. That calls for a legal interpretation of that clause.

THE COURT: Sustained.

MR. HOTHAM: I have no further questions.

THE COURT: Redirect?

MR. HAZELTON: I have none, Your Honor.

THE COURT: Thank you, sir, you are excused and free to go.

Thank you for coming.

MR. HAZELTON: The Defendant has no further evidence, to present, Your Honor.

MR. HOTHAM.: Your Honor, the State would like to argue the aggravating and mitigating factors in this case.

The State believes firmly that there are three aggravating factors in this case which have been proven beyond a reasonable doubt at the trial.

First of these is the risk of death to another, and [R.T. 8] it is the State's contention that the trial testimony indicates that Kimberly Holmes, while

sitting in the vehicle, was in the direct line of fire of the Defendant as he shot the victim from approximately five, six or seven feet away.

She testified that she was sitting in the car for at least three of the shots, and the evidence shows that the first two shots occurred while the car door was open, and therefore the shells, the bullets could have easily have hit her on a direct line of fire from the testimony from the defendant as he fired those shots.

The third shot occurred after she had shut the door, and there is a possibility that a ricochet from the Defendant's body, one foot away, could have hit her.

Her testimony was that the fourth shot was when the Defendant shot the victim in the back after he had dragged him over into the weeds.

The Defendant's testimony, through Detective Locksa, was that all four shots had occurred at the car, and that Kimberly had been inside the vehicle, and that he had been five, six or seven feet away from the victim as he shot.

I analyze or analogize this case with State v. Blazak. In Blazak, which is cited in my memorandum, Blazak involved a robbery attempt in a bar, and in that case the Defendant had fired four shots into the bartender after the bartender had refused to give him his money, and then had fired [R.T. 9] several other shots which struck the next person over and struck the next person over from that, and it is the State's contention in that case the court held that there was a grave risk of danger, and that was a proper aggravating circumstance to be

found, and it is the State's argument that that can be analogized to Kimberly Holmes sitting in the car as being exactly the same as the third patron who was sitting on the stool in the bar who was in grave risk of danger, which the court specifically found.

The second factor, aggravating circumstance which is proven by the trial testimony is the expectation of pecuniary gain.

This factor is not much reported because there's only one case in Arizona which even talks about it, but that is State v. Madsen, which is stated in my memorandum, and in that case the court held that the test of that aggravating circumstance was, "the receipt of the money must be the cause of the murder, not a result of the murder."

And it's clearly through in this case, I don't think there's any quibbling from the defense attorney about this at all, that the cause of the murder was the fact of the robbery of George Koslosky, which was due to the desire to receive money.

Now, I have cited to the Court in my memorandum a great many cases from a great many other jurisdictions, and in [R.T. 10] fact, the supreme jurisdiction in the land, the U.S. Supreme Court.

The U.S. Supreme Court in Gregg v. Georgia, and Proffitt v. Florida, which are cited in my memorandum, held that the death penalty could be properly imposed after it had been stricken in firm (sic), and the facts of Gregg v. Georgia are almost exactly the same as the facts in this case.

In Gregg v. Georgia, the Defendant and a friend were hitchhiking and were picked

up by the eventual victim, and there was testimony that the two people, the friend and the Defendant, had discussed robbing the victim, and that the Defendant at one point had shot the victim and then gotten the money and driven away in the automobile, which is almost exactly the factual situation that we have.

In Gregg v. Georgia in the lower court, the Supreme Court of Georgia had found the aggravating circumstance that the crime had been committed in the expectation of pecuniary gain, and the U.S. Supreme Court specifically held that that was a proper aggravating circumstance and that holding by the Georgia Supreme Court was proper.

Proffitt v. Florida, the companion landmark case, also was in a burglary situation, and they held there that a

burglary committed for pecuniary gain could also be considered under this aggravating factor.

I also cite to the Court various other [R.T. 11] jurisdictions, Arkansas, Florida, Mississippi, Nebraska, Utah, just to name a few, which have specifically held with statutes very similar to our statute that the commission of murder-robbery, that type of felony murder in a robbery situation, the aggravating factor of the expectation of pecuniary gain is viable and does find ground in those facts.

Our statutory scheme is very, very similar, Your Honor, to the scheme in Gregg v. Georgia and and (sic) in Proffitt v. Florida, and I noted in my memorandum that at least two of the Arizona cases which specifically hold

that our system, our statutory system is similar to that in the U.S. Supreme Court cases.

Now, Mr. Hazelton argues that subsection E-5 simply applies to murder for higher (sic) cases, and I would submit to the Court that that is not true.

I would quote from the brief in the Tyson (sic) case, which is presently the brief of the Attorney General's office in the Tyson (sic) case, which is presently in front of the Court.

It was the similar type of argument being made by the defense saying that it's too narrow to include a murder done in the course simply to rob, and the argument in the brief says that this interpretation fails to account for the additional language in the statute itself.

If the Court considers 5, which states that the Defendant committed the offense

as consideration for the [R.T. 12] receipt or in the expectation of the receipt of anything of pecuniary value, it is argued that if the Court were to remove the second subsection of that sentence, or in the expectation of the receipt, that by itself alone would handle the contract murder situation, regardless or not of whether the murderer is killed, because, as Mr. Hazelton would be arguing in contract law, consideration is the inducement to a contract, an act or forbearance for the promise thereof which is offered.

Consideration doesn't have to mean the payment, it's simply the consideration, the inducement or the act or forbearance.

Whether the hit man is actually paid when he kills because of agreement to be paid, he is covered by the portion of E-5

without the second subsection, which I'm arguing today, or in the expectation of the receipt, because the first part about the hit man would be covered as consideration.

So I think that the fact that the first part of that sentence refers to consideration, that clearly is talking about the murder for higher (sic) situation, but they, the Legislature specifically put in a second part of that sentence that says, "or in the expectation of the receipt," and it's the State's position, as covered by all these other jurisdictions, that that includes murders in the commission of robberies, and in that sort of situation.

The brief in the Tyson (sic) case goes on to say it is [R.T. 13] one of the cardinal rules of statutory construction

that statutes are to be given whenever possible such effect that no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant.

They cite State v. Deddens (phonetic).

Mr. Hazelton's position, which makes of the underlying clause mere surplusage would therefore be unacceptable.

Also cited in the Tyson (sic) brief is State v. Snow, 383 Atlantic Second, which states, "We are guided by the fundamental rule of statutory construction that words must be given their common meaning, unless the statute discloses a contrary intent."

Pecuniary plainly means of or relating to money, and benefit plainly means gain or an advantage.

Your Honor, I think the legislative intent is clear from the fact that there

are two different subsections, two different subclauses in that sentence to say that the first one applies to the murders for higher (sic) and the second one applies whenever there's an expectation of pecuniary gain, and this argument that I'm making today is, I think, bound and followed through by the way that the wording in Madsen is worded.

I think it's understood in the way that Madsen says that that whole paragraph applies in any kind of expectation of pecuniary gain. [R.T. 14]

If the court had desired at that time to say, no, pecuniary gain only applies in murder for higher (sic) situations, E-5 only applies in murder for higher (sic) situations, that would have been an excellent time to do that, but Madsen, they didn't do that, they simply said,

well, this insurance payment does not appear to be beyond a reasonable doubt the reason for the murder, but I believe they left open the door saying felony murders can be considered when it's for the expectation of pecuniary gain.

Now, the third point that the State feels that has been proven is the aggravating circumstance of heinous, cruel or depraved, and I will be the first to admit that the Supreme Court decisions are somewhat confusing as to what the important factors are, but in this case, I think the facts by themselves show that it was heinous and cruel, and the Court only needs to find, one, due to the recent case of Ceya, which stated that there's only one of those factors that really needs to be found in order for the whole aggravating circumstance to be found.

In this situation, the testimony revealed that the defendant awoke the victim from his sleep, pointed a gun at his head, made him get out of the car, and ordered the victim into the trunk of the car.

The victim refused, stating that he feared that he would suffocate in the trunk.

And then the defendant fired a shot over the [R.T. 15] victim's head, fired a second shot which hit the victim, causing the victim to yell, "Jesus Christ," and fall to the ground bleeding.

The Defendant fired a third shot into the victim's back, as the victim lay helplessly on the ground.

The victim then began to gurgle and gasp for breath, because his lungs had been punctured.

The Defendant then dragged the body over 250 feet into the desert behind some bushes.

He then fired a fourth shot, hitting the victim in the back again, stated, "sorry, dude," then took the money and the billfold from the body and left the victim to die, bleeding in the desert.

Those facts show both cruelty and heinousness.

Under the definition of cruelty under Ceya, they're talking more about the pain and suffering and anguish to the victim, and we know that the victim suffered because he was worried about suffocating in the trunk. He cried out, and he gurgled and gasped, and he laid there from those wounds in his back in the desert bleeding to death.

That certainly is pain and suffering which qualifies under the definition of cruelty.

We also have heinousness, the shooting of the victim twice in the back, because heinousness goes to the depravity or evil of the defendant's mind. [R.T. 16]

Shooting him repeatedly in the back, and the last time certainly while he lay helplessly on the ground, we don't know whether he was begging for mercy or what the situation was at that time, and driving away and leaving the body out in the desert, those certainly are acts showing a depraved mind which go to the heinousness of the situation.

And the cases that I've cited to the Court indicate that there is a trend in the law in the last two and a half years.

All of the cases, I believe, that have been decided this year, 1980, have been

finding cruel and heinous in similar type situations.

In Ceja, it was cruel and heinous to shoot a victim and drag a person into a bedroom and shoot them in the head four times, and then shoot another person in the back after that person had been mortally inflicted previously which is very similar to our situation.

The medical testimony was that the cause of death could have been either of the gunshot wounds to the chest, assuming that the first shot was a mortal wound. The second shot in the back can also be considered to be cruel and heinous.

In Steelman, court found it was cruel and heinous to bind and gag two people prior to shooting them, and also the fact in that case it was considered that the murders were unnecessary. [R.T. 17]

Surely in this case the murder was unnecessary.

In State v. Mata, the raping and beating of a victim and cutting her throat was found to be cruel and heinous. In State v. Knapp, the burning of two children by their father was found to be cruel and heinous. And in State v. Blazak -- all these citations are in my memorandum -- the shooting of the victim four times during robbery was found to be cruel or depraved.

And this case is almost exactly the same or has a lot of similarities to the Blazak case.

Blazak was the robbery of the bartender, and the purpose of that shooting was indeed also robbery, as in this case, and there was four shots into the body of the victim, which is the same

in both cases, and in that case, in Blazak, they found that was cruel or depraved.

They pointed out that there was no justification for defendant's actions in that even though the bartender would not comply with the robber's demands, he did not offer any actual resistance.

This is exactly the same as in our case, even though George Koslosky would not crawl in the trunk or give the Defendant the money, he did not offer any actual physical resistance, and therefore, there was no reason whatsoever for the Defendant to shoot the victim.

And the criteria in these previous cases shows that [R.T. 18] that is cruel and heinous.

The court is also instructed that it must, after it finds whether there are any aggravating factors, determine

whether there are any mitigating factors to balance against the aggravating factors.

Mr. Hazelton has filed a memorandum which cites to the Court several mitigating factors.

One of these is the youth of the Defendant.

The latest case, the latest Supreme Court case on youth, State versus Ceja, which is cited in my memorandum, tells you that there is something more to be considered than simply age.

Ceja, the defendant in Ceja was found that he had planned the crimes and prepared the crimes, and he was found to be mature, and deliberate about the crimes, and those factors made the Court find that there were no mitigating factors, that age did not qualify as a mitigating factor.

Another case, State v. Valencia, the Defendant was 16, and in that case he shot his victim once in the face while attempting to rob her, and in that case, age was held to not to be a mitigating type of factor.

It is submitted to the Court that herewith the Defendant being 19, the evidence was very clear that he planned the robbery, and he deliberated about this, and that he is mature and very sophisticated for his age. [R.T. 19]

The presentence report indicates that he has been using drugs since age 12 or 13, drugs and alcohol, and that he has had a record with the juvenile authorities, and was placed on probation for, I believe it was theft, and had -- was incarcerated in a juvenile home or placement center for awhile.

These are factors that the Court can consider in determining whether the Defendant's age is a mitigating factor, and it is the State's position that in this case the Defendant's age is not a mitigating factor.

Defense counsel will also argue that incapacity is present in this case.

The most recent case on this matter, State v. Jordan, which was only handed down two weeks ago, stated that the fact that the Defendant was to some degree intoxicated, is not by itself a mitigating circumstance. Whether the Defendant's intoxication is a mitigating circumstance depends upon the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the upholding of law was significantly impaired.

We have testimony from the trial that the Defendant's capacity was not significantly impaired

Kimberly Holmes testified that he had been drinking but that he was driving and functioning and talking properly and that there was no impairment.

The Defendant, on the other hand, testified that he [R.T. 20] was passed out or asleep and slept through the whole murder.

I would suggest to the Court that the more reliable witness in this case would be Kimberly Holmes.

In conclusion, Your Honor, the State has proven three aggravating circumstances and no mitigating circumstances exist sufficiently substantial to call for leniency, therefore, the death penalty is appropriate and should be imposed.

If the Court feels that it does not wish to determine -- does not wish to impose death, the State would argue and request that the sentences be run consecutively.

There is a great deal of authority in Arizona which allows the Court to run a life sentence from a murder first degree conviction consecutively to other sentences, and I cited those in my brief.

In fact, the Supreme Court just recently decided in State v. Lujan that it would be proper to run a murder, first degree life sentence consecutively to a burglary sentence, and that is under the new code and applies -- strike that.

I don't know whether that's under the new code or not, but that certainly applies, and I also stated in my argument the cases that cite the fact that double

punishment does not apply in felony murder type of cases because they are separate offenses under the felony murder doctrine, and therefore under the rules of criminal procedure, 26-13, they can be made to run consecutively. [R.T. 21]

So it's the State's position that the death penalty should be imposed because the State has proven beyond a reasonable doubt three aggravating factors, and there are no mitigating factors.

And if this Court does not impose the death penalty, the State would request that the sentences be run consecutively.

Thank you.

MR. HAZELTON: Your Honor, I have submitted a memorandum in anticipation of responding to the aggravating circumstances that are proposed by Mr. Hotham. Also a mitigating memorandum and a sentencing memorandum.

If I could speak first to those arguments set forth by Mr. Hotham, I believe I've covered them all in my memorandum, but to amplify them, Your Honor, as to 13-703 at 3, the scene of the crime was on a deserted highway rather than a public place, or at least there was no evidence of other vehicles or people around.

The only possible person who could have been subjected to grave risk of death would, of course, be Kimberly Holmes.

She testified at the preliminary hearing that the gun was never pointed in her direction.

Indeed, Your Honor, she would have had to have been perpendicular to the fire from the position of the defendant and the victim. [R.T. 22]

Although the victim may have been in close proximity to her door, he was apart

from her door. Her door was open at the first shot, according to her testimony.

He then fell against her door, which implies he was a distance away.

The Defendant, according to her testimony, was to the rear of her car, the victim was to the front, so any line of fire would have had to have been perpendicular to her position. She was not in the line of fire.

She then shut, according to her testimony at the trial and at the preliminary hearing, she then shut the car door. The window was rolled up. She could not have been in grave risk of death.

The second circumstance urged by Mr. Hotham is that the pecuniary gain of proceeds from the robbery is sufficient.

Your Honor, this case cited by Mr. Hotham in Gregg v. Georgia first to an

aggravating circumstance which is different from ours, and I think that many of those cases that he cited, the statute is not the same.

Our statute refers to, and I'm quoting, "the Defendant committed the offense as consideration," and I underscore that, "for the receipt or in expectation for the receipt of anything of pecuniary value."

Mr. Hotham focuses on pecuniary value.

I urge the Court to look at the word consideration. [R.T. 23] Its meaning is significant in contract law. It means an inducement to contract.

The statute in the Georgia case refers to the offender committed the offense of murder for himself or another for the purpose of receiving money or anything of monetary value.

Your Honor, that is a different aggravating circumstance than we have. and that may include a felony murder where the profit motive is evidence (sic).

Here it's very obvious that the language must mean a contract with another, agreement with another, either being paid first and then committing the murder for higher (sic), or committing the murder for higher (sic) and then being paid.

Those are the reasons for the phrase that Mr. Hotham discussed extensively in expectation of the receipt.

Your Honor, that circumstance does not apply in this instance. This was not a contract murder.

And finally, Your Honor, the circumstance of F-6 especially, heinous or cruel and depraved, Mr. Hotham argued

that this crime was heinous, cruel or depraved. It may well be, Your Honor. The statute requires that it be especially.

Citing all the cases even that Mr. Hotham referred to, I believe that the import of all of those decisions is that we have to have something apart from the norm.

I refer to State v. Watson where the Defendant shot [R.T. 24] the victim four times in the back. State v. Brookover, he was shot twice in the back. Even stood over him saying, "It'll be okay, don't worry buddy, it'll be okay," shot him again in the back.

The Court said it was cowardly, but not cruel and depraved.

Your Honor, I think we have to have something than the fact of death imposed

by gunshot wounds to the back. It sets the import of all of the decisions as I read them.

In State v. Lujan as well, the victim lay unconscious after having been hit in the head by another person involved in the commission of the burglary. The killing was absolutely unnecessary to cause any plan of theft or burglary, and the Court there said an unnecessary killing is not enough.

I believe he was stabbed in the back at that point.

There is absolutely no evidence that the victim suffered unnecessarily. Any death you can assume is going to involve pain or suffering to some agree.

There was no evidence of the time of death, which shot caused the death.

The fact of gurgling, as testified by Kimberly Holmes, does not mean the

Defendant was alive, or — strike that — the victim was alive at that point.

There was no evidence of a purge of violence, nothing to comport or to comply with the statutory requirement [R.T. 25] that the acts be especially heinous or especially cruel, just two shots to the back causing death in none other than a swift manner is certainly not in compliance with the statute, nor with its intent, nor with the instruction that's been given by the Supreme Court.

There was no atrocity, no evidence of excessive pain, no evidence of torture, Your Honor.

The fact that a robbery occurred only implies that because it's felony murder there was not a premeditation or the mental element involved to elevate it to murder, first degree, on its own.

I believe in that instance, Your Honor, that it's while the death penalty is available for felony murder, where here the murder was obviously necessary in order to accomplish the robbery. It was done so in a manner not apart from the norm of murders without premeditation.

Your Honor, I believe that the death penalty is wholly inappropriate because there are no aggravating circumstances, and I do believe there are mitigating circumstances.

I have cited in my memorandum the defendant's -- as the Court is aware, the Defendant had turned 19 five days before the date of the homicide.

There are cases in which younger men have been, younger individuals have been sentenced to death. I leave that [R.T. 26] to the Court's discretion in

determining whether this mitigating circumstance does exist.

He was just 19. We try people in Arizona as an adult when they're 18, that's the age of majority. In the overall scheme of things, the age of 19 is young comparatively, and I urge the Court to consider that his age be a mitigating circumstance.

Additionally, Your Honor, there was evidence that the Defendant consumed up to ten beers prior to the commission of the offense, plus quaalude prior to the commission of the offense.

His blood alcohol would have been obviously well over .10, the point of intoxication regared (sic) for driving under the influence, together with the sedative effect of quaalude could not have done anything to enhance his

capacity to appreciate the wrongfulness of his behavior, but had to have reduced his capacity.

And finally, Your Honor, I urge the Court to find those two mitigating circumstances.

Finally, Your Honor, I have submitted a memorandum. I have cited the cases which have heretofore interpreted the statute on double statute, which is was under the old code. A.R.S. 13-1641, and all of those decisions, Your Honor, refer to a circumstance or a commission of a crime where more than one act supported the felony and the murder. [R.T. 27]

Of each of those cases, even the case -- misplaced my notes.

I cited all of the cases. Even the case, I believe it is State v. Clayton, where the court upheld the imposition of

the consecutive sentence for armed robbery, a felony murder.

There the Court held, and I believe it was Justice Lockwood who specifically held that there was -- there were separate acts supporting the robbery, which was a robbery of the manager of the Indian Drive-in here in Phoenix, and then the actual killing of a bystander in the process of escape, and I just point that out to the Court, because in each of these decisions, a common thread, a common finding in each one of them is that there was a separate act.

Obviously in the cases where the Court has upheld consecutive sentences or indeed some of these decisions concerning the fact of conviction alone, because under the old statute, 1641, the Court could not convict a person for acts, for one act and two crimes.

So the question there was simply could he be convicted of two offenses.

Now we know under 116 that he may be convicted of two offenses, but you cannot be sentenced consecutively. So there are slightly different issues being addressed in those cases, but nevertheless, the common thread there was that there be separate acts which supported the convictions for the [R.T. 28] underlying felony and separate act supporting the commission of a homicide, even though it was in -- it was in the same overall time frame, there was separate acts involved.

Here, Your Honor, and I can't stress this enough, that the robbery statute requires for us to overcome a person's resistance in order to take the property from his person or immediate presence, and the jury found that the Defendant

used the force, a deadly force to overcome George Koslosky's resistance to force the surrender of the property, and therefore, it was one act that accomplished the force for the robbery and the homicide. One act, Your Honor.

Therefore, under 13-116, the new code, that one act would limit the Court's jurisdiction in imposing consecutive sentences; therefore, Your Honor, I urge the Court, first of all, to find that no aggravating circumstances exist, as they clearly do not, that there are two mitigating circumstances, and that the only appropriate sentence, therefore, would be life imprisonment.

Also, Your Honor, because of the nature, the felony murder, the reduced mental state of the Defendant is obvious, this Court should run the two sentences

concurrently, the homicide sentence and the armed robbery.

MR. HOTHAM: Just briefly, Your Honor.

As far as the mitigating factor, incapacity, which Mr. Hazelton mentioned, the only evidence that any drugs were [R.T. 29] taken was the testimony of the Defendant, and that's the same person who testified that he slept through the whole thing, so I don't believe that that is credible evidence that can be used to support Mr. Hazelton's position that he had an impaired capacity.

Mr. Hazelton also cited to the Court as far as the factor of cruel and heinous several cases, but I believe that all of those cases which he cited can be distinguished on their facts as to why those were not cruel and heinous, and this one, and the others like it are -- he cited Brookover.

In that case, there were only two shots in very close proximity, and it was during a drug ripoff type of situation, which certainly would be a factor that the Court would take into consideration.

He also cited State versus Watson, where the defendant was shot, but the facts of that case were that the shooting was done during a shoot-out, in other words, one defendant was shooting at the victim, and the victim was firing back at the one defendant, and a second victim came up and shot at the victim.

So that can be distinguished simply because that was sort of a gun fight at O.K. Corral situation, that anything goes, and that would not be an abnormal type of situation.

He also cited Lujan and Ceja, and Lujan simply was referring to a one stab wound

in the abdomen, and the State [R.T. 30] would concur that one stab wound in the abdomen is not cruel or heinous.

What we have here are four separate shots, two of which ended up in the Defendant's back, and one of which occurred after, quite sometime after, I believe the testimony was maybe five minutes after, and the Defendant had dragged the body out into the desert and had put it behind some bushes to hide the body so that it would either lie there and bleed to death or rot before anyone would ever find it.

I believe that these factors show both cruelty, the pain and suffering of the victim and heinousness for the evilness and the depravity in the Defendant's mind.

Thank you.

THE COURT: You're welcome.

See counsel in chambers.

(Court adjourned) [R.T. 31]

[Certificate omitted in printing.]

[R.T. 32]

Special Verdict at Initial Sentencing
July 7, 1980

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff,	)	
vs.	)	NO. CR-109802
DENNIS W. RUMSEY, Defendant,	)	SPECIAL VERDICT

As to aggravating circumstances, the Court finds the following:

1. The defendant has not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant has not been previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense, the defendant did not create a grave risk of death to another person in addition to the victim of the offense.

The Court does find that the defendant did create a risk of death to another person, other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

4. The defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.

In this regard, the Court does not agree with the State's interpretation of A.R.S. 13-703(F)(5) and State v. Madsen filed

March 26, 1980. The Court believes that when A.R.S. 13-703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc.

6. The facts of the actual shooting incident itself in this case and the facts of the actual shooting incident in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) are very analogous. In Brookover our Supreme Court specifically found the murder was not committed in an "especially heinous, cruel and depraved manner."

This Court therefore finds that the defendant, Dennis W. Rumsey, did not commit the offense in an especially heinous, cruel or depraved manner.

7. The defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution.

There was some evidence of alcohol and/or drug intoxication. There was substantial evidence that such intoxication did not affect defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. The defendant was not under unusual or substantial duress. In fact, there was no evidence of duress at all.

3. The defendant was the individual who actually committed the offense and was not found guilty by reason of being legally

accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The defendant could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or create a grave risk of causing, death to another person.

5. The defendant was barely 19 years of age at the time of the offense. However, the defendant was wise beyond his years as it relates to what occurred in this case. The Court, therefore, does not find age to be a mitigating factor.

The Court, therefore, finds that no aggravating circumstances exist and no mitigating circumstances exist.

DONE IN OPEN COURT this 7 day of July, 1980.

_____

Judge

RUFUS C. COULTER, JR.

Pronouncement of Intitial Sentence
July 7, 1980

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS WAYNE RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Pages 1 through 7

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:

MR. JEFFREY A. HOTHAM
Deputy County Attorney

For the Defendant:

MR. ARTHUR G. HAZELTON
Deputy Public Defender

Phoenix, Arizona
July 7, 1980

(JEROME R. MALECKA was duly sworn to act as Official Court Reporter herein.)

THE COURT: CR-109802, State of Arizona versus Rumsey. This is the time set for sentencing.

Is the State ready?

MR. HOTHAM: Yes, Your Honor.

THE COURT: Is the Defendant ready?

MR. HAZELTON: Yes, Your Honor. Art

Hazelton appearing for and with Mr. Rumsey.

THE COURT: You are Mr. Dennis Wayne Rumsey?

THE DEFENDANT: Yes.

THE COURT: Mr. Rumsey, you have been charged by the State of Arizona with the crimes of Count I, murder, first degree, a class one felony, and Count II, armed robbery, a dangerous felony and class two felony, involving the use or exhibition of a deadly [R.T. 2][1] weapon, and of these charges you have been found guilty by the jury's verdict.

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1. R.T. is the reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

Do you have anything to say or any legal cause to show why judgment and sentence should not now be imposed?

THE DEFENDANT: No.

THE COURT: Counsel.

MR. HAZELTON: Your Honor, there is no legal cause.

On behalf of Mr. Rumsey, I would urge the Court to follow the recommendation I made in the presentence memorandum regarding the first degree murder conviction. I believe that there is no alternative but to impose life imprisonment under the facts of the case.

And also as to the armed robbery, a dangerous conviction, Your Honor, it's my opinion that A.R.S. 13-116 does not allow anything but a concurrent sentence, given the fact that the armed robbery supported the finding of the murder first degree conviction.

Therefore, Your Honor, I urge the Court to impose any sentence appropriate as a concurrent sentence.

THE COURT: There is no legal cause?

MR. HAZELTON: No legal cause.

THE COURT: Mr. Rumsey, are you in any way dissatisfied or unhappy with the sevices or representation that have been provided to you by your attorney?

THE DEFENDANT: No. [R.T. 3]

THE COURT: No legal cause appearing, and by reason of the findings and the verdict of the jury, it is the judgment of this Court that you are guilty of the crimes of Count I, murder first degree, a class one felony, and that you are guilty of the crime of Count II, armed robbery, a class two and dangerous felony involving the use or exhibition of a deadly weapon.

The Court having heretofore filed its special verdict herein, having found no aggravating circumstances and no mitigating circumstances pursuant to statute, it is ordered as punishment for the crime of Count I, murder first degree, a class one felony, that you be committed to the Department of Corrections for the rest of your natural life without the possibility of parole until you have served 25 calendar years.

As punishment for the crime of Count II, armed robbery, a dangerous offense involving the use or exhibition of a deadly weapon, a class two felony, it is ordered that you be committed to the Department of Corrections for the aggravated term of 25 years -- strike that, I'm sorry, I have to back up.

In connection with Count I, it is ordered this sentence shall commence to run as of this date with the Defendant to receive credit for 231 days heretofore incarcerated in connection with this offense.

Now, as punishment for the crime of Count II, armed robbery, a class two and dangerous offense involving the use of a weapon or dangerous instrument, it is ordered that you be committed [R.T. 4] to the Department of Corrections for the aggravated term of 21 years -- this term is to run consecutive to the sentence imposed in Count I.

The Court's reason for imposing consecutive sentences are as follows:

The Defendant is a significant danger to society and should be removed from society for the protection of society for

the maximum time possible. Based on the record before this Court as to Count II, armed robbery, a dangerous offense, this Court finds, pursuant to A.R.S. 13-702(d)(9), the following aggravating circumstances exist which is not outweighed by mitigating circumstances and which justifies a greater sentence than the presumptive sentence:

One, the Defendant planned this robbery which resulted in the needless death of an individual who befriended the Defendant and girlfriend (sic) in order to obtain what the Defendant knew was only a few hundred dollars to possibly obtain the victim's car, although the Court is satisfied the primary motive was to receive something in the approximate sum of a few hundred dollars.

As I state, based on the record before this Court, the court finds that those -- that that aggravating circumstance does exist which is not outweighed by mitigating circumstances and which justifies a greater sentence than the presumptive sentence.

This judgment shall be the authority for the Director [R.T. 5] of the Department of Corrections to incarcerate you for the period of time provided for by law and the authority of the sheriff to transport you to the Department of Corrections.

Mr. Rumsey, I wish to advise you of your rights to appeal. You have the right to appeal this judgment and sentence just imposed. This appeal must be filed in writing within 20 days from

this date with the Clerk of the Court. If you fail to do so, you will lose your right to appeal.

Do you understand that?

THE DEFENDANT: Uh-huh, yes.

THE COURT: You have the right to be represented by an attorney in connection with that appeal, and if you cannot afford one, one will be appointed for you by the Court at no expense to you. You also have the right to a complete transcript of the entire proceedings and again, if you cannot afford such a transcript, same will be supplied to you by the Court at no expense to you.

Do you understand your rights to appeal?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights to appeal?

THE DEFENDANT: No.

THE COURT: My Bailiff will supply you with a copy of your rights to appeal. I want you to sign it, leave the copy with her -- excuse me, leave the original with her and keep the copy for yourself.
[R.T. 6]

It is ordered remanding the Defendant to the custody of the Sheriff.

Thank you, Counsel.

(Whereupon, the matter was concluded.)

* * * *

[Certificate omitted in printing.]
[R.T. 7]

Initial Judgment and Sentence
July 7, 1980

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

15-E	July 7, 1980	RUFUS C. COULTER, JR.
DIV	DATE	JUDGE OR COMMISSIONER

State of Arizona

vs.

DENNIS WAYNE RUMSEY

County Attorney
By: Jeff Hotham
Adult Probation
Office
Maricopa County
Sheriff's Office

Arthur Hazelton (PD)
Defense Counsel
Clerk of Court, Cr. Judgments
Arizona Department of Corrections

SENTENCE--STATE PRISON--PRESUMPTIVE TERM (COUNT ONE)
(No Prior Conviction Alleged)
AGGRAVATED TERM (COUNT TWO)

The State is represented by the above-named deputy; defendant is present with above-named counsel. Court Reporter: JERRY MALECKA

The defendant is advised of the charge, the determination of guilt and is given an oportunity to speak.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the defendant is guilty of the crime of Count I, Murder, 1st degree, Class 1 felony, and Count II, Armed Robbery, a dangerous and Class 2 felony, involving use or exhibition of a deadly weapon

a nondangerous/dangerous and nonrepetitive class

felony committed on: October 10, 1979

in violation of A.R.S. 13-1105, 1101, 604, 703, 1901, 1902, 1904, 601, 701, 702, 801.

No prior felony conviction was alleged.

Upon consideration of all the facts, law, and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and

that a sentence of incarceration with the Arizona Department of Corrections is appropriate. The Court further finds that there are no aggravating or mitigating circumstances sufficiently substantial to call for a greater or lesser term than the presumptive term.

As punishment for this crime,

AS TO COUNT ONE:

ORDERED that the Defendant be committed to the Arizona Department of Corrections for the rest of his natural life, not to be released until twenty-five calendar years have passed. The sentence will date from July 7, 1980. Defendant is entitled to 231 days of credit as against the sentence for all presentence incarceration served.

AS TO COUNT TWO:

The Court further finds that there are aggravating circumstances sufficiently substantial to call for a term of

incarceration of more than the presumptive term as set by statute. These aggravating circumstances are as stated by the Court on the record.

ORDERED that the Defendant be committed to the Arizona Department of Corrections for a period of twenty-one years, which is the aggravated term. The sentence will run consecutively to the term imposed in Count One.

The Defendant is advised concerning rights of appeal and written notice of those rights is provided.

FILED: Special Verdict.

ORDERED exonerating any bond.

ORDERED authorizing the Sheriff to deliver Defendant to the custody of the Arizona Department of Corrections.

ORDERED the clerk shall remit to the Department of Corrections a copy of this order, plus all presentence reports,

probation violation reports, medical and psychological reports relating to the Defendant and involving this cause.

FILED: Notice of Rights of Appeal, signed by the Defendant.

RUFUS C. COULTER, JR.

Resentencing Hearing
February 1, 1982

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS W. RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

Reporter's Transcript of Proceedings
Pages 1 through 24

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:

MR. JEFF HOTHAM
Deputy County Attorney

For the Defendant:

MR. ARTHUR G. HAZELTON
Deputy Public Defender

Phoenix, Arizona
February 1, 1982
1:30 o'clock p.m.

(JEROME R. MALECKA was duly sworn to act as Official Court Reporter herein.)

THE COURT: CR-109802, State of Arizona versus Dennis W. Rumsey. This is the time set for pre-sentence hearing as mandated by the Supreme Court -- or by reason of the mandate of the Supreme Court.

Before I proceed further, gentlemen, just to set the tone of the record, I have indicated repeatedly to Counsel that I have a good deal of concern over the provisions of Criminal Rule 26.14, which was not raised or referred to by the Supreme Court in its recent decision.

If you gentlemen are prepared to proceed, you may do so.

MR. HOTHAM: Yes, Your Honor. Does the Court wish to have the State's argument on 26.14 on the record before we [R.T. 2][1] proceed with the aggravation hearing itself?

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1. R.T. is reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

THE COURT: However you gentlemen want to handle it, it's okay with me.

MR. HOTHAM: What I would like to do first then, as I indicated in my -- one of my memorandum, is that the Court has indicated that informally it was concerned that Rule 26.14 of the Arizona Rules of Criminal Procedure would preclude this Court from resentencing the Defendant to death. And the State's position basically is that 26.14, as noted in the comments to that Rule, is a codification of North Carolina v. Pearce, and in North Carolina v. Pearce, dealt with a case in which the Defendant appealed, and the opinion was concerned with the chilling effect that subsequently the imposition of a death penalty after an appeal might have.

And it's the State's position that the North Carolina v. Pearce case and 26.14 does not apply in a case where it is the State appealing, because the State's appealing, whether it's by direct appeal or cross appeal or by way of a special action has no chilling effect upon the Defendant's own desire to file an appeal.

There is another case called United States v. DiFrancisco (sic), which I have cited in my memorandum which is applicable to the case at hand because that is -- it is an appeal by the State in which it was held, and that's a 1980 case, in which it was held that when the government appeals, [R.T. 3] a higher -- heavier sentence may be imposed and that there is no double jeopardy problem.

However, if this Court does feel that 26.14 applies to this pre-sentencing, I

would point out that the last paragraph, the last paragraph of 26.14 states, and I'm paraphrasing, that a more severe sentence can be imposed if the Court concludes on the basis of evidence of the conduct by the Defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate. And solely on that issue, having nothing to do with this aggravation hearing or the aggravating factors stated in 703, the State has appended to its memorandum, two grand jury indictments, one out of Indiana charging the Defendant with capital murder for the murder and rape of a young girl by the name of Karen Troy, and also there is another exhibit which is a current indictment in Arizona charging the Defendant with several counts of attempting -- or conspiracy to

assault and kidnap the Department of Corrections leader and the warden and several other people at the prison.

Also, I believe in the pre-sentence report there is information from the Department of Corrections that the Defendant is indeed not a model prisoner.

Now, all of this information is presented to the Court solely for the issue of 26.14, as I said, and not -- does not go to the aggravating circumstances which the State [R.T. 4] must show. But it's the State's position that if the Court does believe that the 26.14 applies, then you can consider the fact that he's indicted for murder and indicted for conspiracy and assault to kidnap and he's been a bad man in prison, you can consider all those things in determining that your original sentence

of life was inappropriate.

And it's the State's position that that sentence was inappropriate. And Rule 26.14 says that you may consider that solely for that issue.

Now, I would like to address the aggravating factors as provided by 13-703.

In my original sentencing memorandum, the State argued three aggravating circumstances that applied to this particular case. And they were the risk of death to another, the fact that the Defendant's conduct was heinous, cruel or depraved and the fact that the Defendant committed this offense as consideration for the receipt or in the expectation of the receipt of anything of pecuniary value.

I mention that last one first. The opinion of the Supreme Court specifically

states, as we argued to this Court at the original sentencing, that the hope of financial gain in this case was the cause of the murder of George Koslosky and not a result, which is the test that the Supreme Court has adopted for determining whether a robbery or a theft -- a murder committed in the course of a robbery or theft is one of these [R.T. 5] aggravating factors.

The Supreme Court specifically said in its opinion, and I recite page eight and nine of its slip opinion, that the trial court erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain. I think it's clear that the Supreme Court has so ruled and I think it's clear that the Court has an obligation to follow the interpretations

of the Supreme Court as to that particular aggravating factor of 13-703. And also not only that, but its a common sense reading of that factor, the evidence that the Court was presented at the time of the trial showed that the Defendant on at least two or three different occasions prior to the murder told Kimberly Holmes that he was going to rob the victim, George Koslosky, and at the time that he was -- right before he killed the man, he told her that he was going to do it then. And that the murder itself flowed out of the robbery and was a consequence of the robbery and it was a result, the key word is "a result" -- excuse me, a "cause" of the murder and not merely a result, which is what the Supreme Court is talking about.

So I feel that if the Court would refer to my original memorandum that we argued previously, and the Supreme Court decision on this matter, that the Court should realize that it is settled now. There have been three other Supreme [R.T. 6] Court cases that have found this to be an aggravating circumstance.

They cite the Clark case and there is a Tison case and another case more recently. So that earlier there was reason to be unsure of what the Supreme Court says. But at this late date there are at least three Supreme Court cases that says, yes, this is an aggravating circumstance.

So I believe that the Court should accept that and find that as an aggravating circumstance in this case.

I would also like to reargue the two points which I had originally argued which are also applicable. In the Court's special verdict of July, 1981, the Court found as to the aggravating circumstance of the risk of death to another, the Court specifically found that the Defendant did create a risk of death to another person other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

Unfortunately the statute doesn't tell us what a grave risk is and what a non-grave risk is. I would simply point to the other cases, and one of the other cases is State v. Blazak, which I have cited in my memorandum, and that case there were several patrons sitting inside a bar and the defendant came in and shot around wildly. And the death penalty was affirmed in that case.

As for grave risk, I think we have to use a common sense definition, and if the Court will recall from the [R.T. 7] testimony, Kimberly said she was right inside the car door on the passenger side and the door was open and the victim was standing right next to her outside of the car door and the Defendant was standing just a few feet back, and that he fired once up into the air and then aimed and fired at the victim, George Koslosky and hit him twice right as he was standing next to the victim -- or next to Kimberly Holmes. I think that a common sensical definition of grave risk of death includes that when they are just inches apart and there is a man a few feet away firing a weapon which strikes the victim and knocks him to the floor -- to the ground, that indeed is grave risk. And I

think the Court perceived that when you wrote in your special verdict that there was a risk of death to Kimberly Holmes.

And I'm asking at this time that the Court find that there was a grave risk to Kimberly Holmes, and that the Court find that as a second aggravating factor.

There is a third possible aggravating factor that the State argues and that is the Defendant committed the offense is an especially heinous, cruel or depraved manner. Now, I note from this Court's special verdict in July of '80 that the Court cited State v. Brookover and talked about the facts in Brookover, and that the Supreme Court had found that the murder was not especially heinous, cruel or depraved.

Well, since the Brookover decision, there have been four or five different

decisions, and the Supreme Court [R.T. 8] has tilted away from the Brookover decision and has been finding routinely cruel and heinous activity in situations such as this. And I've cited most of those cases in my memorandum, Ceja, Steelman, Mata and there are two or three others that have occurred since that time. And it appears that the Supreme Court now is talking about conduct being cruel and heinous, even though it can't apply in Brookover, it now seems to be applying in more of a -- in more recent cases, even though the facts are very similar.

So I would request that the Court reconsider its original determination about the cruelness and the heinous and depravity involved in this particular case. Here, the conduct is both heinous

and cruel. It's heinous because of the depravity and evil in the mind of the Defendant which can be seen by the repeat shootings of the victim in the victim's back while the victim lay helplessly on the ground and then dragging the body out into the desert and leaving the body there to die, to bleed to death. In fact, there was some testimony that the Defendant shot the victim one more time, a fourth time in the back and then said, "See you later, dude", or something like that. That goes to mental state, depravity as it is defined in Ceja.

Also, Your Honor, his conduct was cruel because of the mental anguish to the victim as he pondered suffocating in the trunk. The Defendant ordered him to get into the trunk. [R.T. 9] Certainly that would cause mental anguish in his mind

and certainly he felt pain as he was shot two or three times by the Defendant and as he bled to death out in the desert.

For those particular reasons, the State believes that that aggravating circumstance also applies.

The State believes strongly that there are three aggravating circumstances that the Court should apply. There is at least one for sure that the Supreme Court has indicated applies in this particular matter, and I would refer the Court to 13-703(E), Your Honor, the last half of that says that in weighing the circumstances, if the Court finds one or more of the aggravating circumstances enumerated in Subsection (F) of this Section, that's the three I have just been talking about, and that there are no mitigating circumstances sufficiently

substantial to call for leniency, then the Court shall impose a sentence of death.

I believe that it's mandatory upon the Court to do so. And the Court has already specifically found in its special verdict of July, 1980, that there were no mitigating circumstances present.

The Court discussed the ones as required by the statute and found none of them to apply. And there were no other mitigating circumstances present at that time.

Now, Mr. Hazelton has argued that a new mitigating circumstance has arisen since that time and he cites a case [R.T. 10] called Schad, which was a felony murder case. And the court said that yes, -- the Supreme Court said that yes, the fact that it is a felony murder case is one of

the things that can be considered as a mitigating factor. But I would submit to the Court that there is a big difference between a mitigating factor and being substantially sufficient to call for leniency.

You will note that 1304 -- excuse me 703(E) talked in terms of mitigating circumstances sufficiently substantial to call for leniency. And the cases that held that yes, the Court can find so and so or such and such type of conduct to be mitigating but there is a weighing test involved and the final determination is whether that particular item is sufficiently substantial to call for leniency.

It is the State's position and even the decision in Schad that there -- as far as being a mitigating circumstance, that

that does not outweigh the various aggravating circumstance. And so what the State would like and request the Court do at this time is confirm its original special verdict, that there are no sufficiently substantial mitigating circumstances and to find at least one, ideally all three, of the aggravating circumstances that are present in this case and then proceed under 13-703(E) which mandates -- which requires upon the finding of at least one aggravating circumstance that the Court must impose a sentence of death. I believe it's [R.T. 11] appropriate in this case and should be done.

Thank you.

MR. HAZELTON: Art Hazelton appearing with Mr. Rumsey. Your Honor, I have filed with the Court a sentencing

memorandum and provided the Court with a copy of the decision in Bullington v. Missouri, which I rely on in that decision -- in that memorandum, excuse me.

Your Honor, at the outset I'd like to make it clear that I believe that in the prior special verdict found -- this Court found that several -- all of the enumerated aggravating circumstances did not exist. And the Supreme Court has, of course, instructed this Court as to how to determine or interpret A.R.S. 13-703(F)(5) -- excuse me, (F)(4).

Nevertheless, I believe the Court has instructed the Court that that should have been interpreted as an aggravating circumstance.

It's the Defense's position here, Your Honor, and it will be my urging for the Court to resentence the Defendant to life

imprisonment as was ordered in the first sentencing.

Your Honor, I believe that unlike Mr. Hotham, Rule 26.14 does apply despite the silence of the Supreme Court in its decision concerning the issues raised in that rule, and the decision which it's based upon, which is North [R.T. 12] Carolina v. Pearce. And I have briefed that case. I know that the Court is familiar with it.

I believe that this Court pursuant to that rule and the constitutional issues discussed in the Pearce case which really center around due process, reguire that the Court give no greater sentence to the Defendant than was imposed in the first sentencing.

I believe that Mr. Hotham has really conceded that there are no -- there is no

conduct which has occurred after the sentence was -- that was imposed in June or July of 1980 that amounts to conduct which should increase the sentence from life imprisonment to death.

I believe that in reading the Rule 26.14 that the Court must also read into that the sentencing requirement of 13-703. I believe that the conduct must amount to an aggravating circumstance in order to increase the punishment. I don't believe simply behavioral problems in the prison can suffice for this Court to reconsider its prior determination of life imprisonment, all other factors being equal and impose a greater sentence, which the only other choice is death. I believe that you have to find an aggravating circumstance and the State has failed to present any evidence of an

additional aggravating circumstance occurring after the first sentence was imposed.

I will just point out that the indictments that [R.T. 13] Mr. Hotham refers to, the one which is an indictment out of Indiana was brought down in August of 1981, alleging the homicide of a girl named Karen Troy, I believe, which occurred prior to the sentencing of the Defendant in this matter. And I also understand that the indictment out of Pinal County, I believe, has been dismissed and I think has been refiled, possibly reducing the charges in some way. But nevertheless, they are only indictments and they don't amount to convictions under the aggravating sections of 13-703. And there is no other conduct that's been alluded to even

in the pre-sentence report that amounts to an aggravating circumstance.

So if the Court takes the Defendant's position that the Rule 26.14 must apply, not only because it's a rule as the Supreme Court has promulgated, but also because it stands for the constitutional interpretation by the Supreme Court of the United States in North Carolina v. Pearce, then this Court is without power to impose the death penalty in this case, despite the provisions that were cited by Mr. Hotham in 13-703 when an aggravating circumstance is found.

Your Honor, I also believe the decision of Bullington v. Missouri, and I believe there an issue which is discussed in Pearce is extended, and that is the principle of double jeopardy. In the Bullington case the Supreme Court of the

United States found that the bifurcated sentencing provisions of Missouri's death penalty statute really amounted [R.T.. 14] to a separate trial. The only difference, and I've read the statute that the Court was referring to. It's in the footnotes in the Bullington decision, which the Court has here. The only difference in that case is simply that the jury was the fact finder and the jury was the one that imposed the sentence. I see no difference at all in our statute but for that one difference and I believe that it shouldn't destroy the use that the Supreme Court meant it to be in the Bullington decision.

I believe that double jeopardy does attach and I think that the death penalty and punishment concerning homicide in the first degree is different than sentencing

other crimes such as property crimes, assault, whatever. I believe it's different because in that hearing, the one that we had here just in 1980, it was a hearing where the State was required to bear the burden of proof in proving aggravating circumstances, and the Defendant was required to put on proof of mitigating circumstances. And the Court was required to find a special verdict. Therefore, it is a second trial, although it may lack some of the same kinds of structure that is in the jury trial that preceded it, nevertheless it's a hearing and that's exactly what the decision in Bullington found, that it was a separate trial, that double jeopardy attaches. And if you get life in prison, once it's brought back, regardless of the method of which it's brought back to [R.T. 15] the

Court, the Court can't impose the death penalty, double jeopardy attaches.

He was found not guilty of the death penalty in the special hearing by special verdict and double jeopardy attaches from then on.

Your Honor, all of this can be alleviated in my opinion and I believe the circumstances calls for this entire issue here concerning what the Court is to do upon resentencing when the Supreme Court has said that you mistakenly interpreted the statute and you should have found an aggravating circumstance and I discuss that in my memorandum. And Mr. Hotham has referred to it in State v. Schad. The Court did find and this was a decision that came out in 1981 and it was a decision that came out obviously after this Court issued its special verdict and

was -- it was not something that I believe is a mitigating circumstance as such at the time. But nevertheless the Court in Schad and it's mentioned in my citations in my memorandum that the giving of a felony murder instruction is a mitigating circumstance and it was properly construed by the Court.

Not only here do we have a circumstance where that instruction was given, but I think the Court can consider the testimony of the juror-foreman who came in at the last sentencing hearing. His testimony was that the jury rejected premeditated murder, which was the other instruction and found the Defendant guilty of murder in the first degree on the felony [R.T. 16] murder instruction.

Now, so beyond just the fact that the instruction was given along with another

instruction, you have here that the jury followed that instruction in giving its -- rendering its verdict.

Your Honor, I believe that therefore, this mitigating circumstance which I don't believe was discussed by the Court in the first special verdict, should be weighted and considered by the Court to counter-balance the required aggravating circumstance that the Supreme Court of Arizona has ordered the Court to find. And I say that for several reasons.

Nowhere in A.R.S. 13-703 does it say that the aggravating circumstances that are to be considered by the Court are of equal weight, one to another, or against any of the mitigating circumstances in 13-703(G), which the Court must consider and that others can consider.

Your Honor, in this particular

aggravating circumstance that you must find, apparently I believe that it was of a value or of weight much less than the other aggravating circumstances which the Court has found do not exist and I believe properly has found such.

Your Honor, we have here a case where had the felony murder instruction not been given, the jury, I believe, would have been required to find murder second. I believe [R.T. 17] there was no premeditation. The jury rejected that instruction and found on felony murder. So what you have, the felony murder statute elevates an offense from murder first -- from murder second degree really to murder first degree, and that being true, the Defendant really gets punished twice for the same conduct, that is he gets punished for having committed a

murder during the perpetration of an armed robbery and then because it was armed robbery that he was committing the murder for, he gets sentenced to death. So you have compounding the same acts, the same acts and the same circumstance twice. Therefore, my argument is that that aggravating circumstance should not be weighted as heavily as, say a circumstance that does not exist here. But under 703(F)(1), where the Defendant has been convicted of other crimes involving life imprisonment or serious physical injury or violence or threats of violence under (2), I believe that those are probably more serious aggravating circumstances and we don't have those here.

But I believe under the facts of this case that this Court should not weight

the aggravating circumstance under 4 -- (F)(4) as heavily as Mr. Hotham would ask the Court to do. But I think that the Court should consider the mitigating circumstance that the Supreme Court has said is a mitigating circumstance and find that the aggravating circumstances do -- that one aggravating circumstance does not require the imposition of the death penalty because of the sufficiency of [R.T. 18] the mitigating circumstance which I believe does exist. And I -- the Supreme Court of Arizona says it is a mitigating circumstance so you have to consider it. But in that weighting process, the balancing I believe these factors are very important for the Court's consideration and I do think you have a compounding of one act to elevate this offense from murder second all the

way to murder first degree and then the death penalty, if Mr. Hotham's argument is persuasive to the Court, and I believe that should not be.

Your Honor, I have no other evidence to present. I have presented none in this hearing at all. I know that the Court is concerned about the interpretation of the Supreme Court's mandate here for resentencing.

Your Honor, the Supreme Court cannot mandate that this Court impose the death penalty and I therefore don't believe that it should be read into the decision that it's mandatory that you impose the death penalty. I believe that I cited the legal authority which would require you to impose the same sentence. I believe that it would be unlawful, despite the wording of A.R.S. 13-703, it

would be unlawful -- it's on higher authority, I believe, the Constitution of the United States, to impose a more strict or harsh sentence upon Mr. Rumsey.

Therefore, I urge the Court to reimpose the same sentence of life imprisonment. [R.T. 19]

MR. HOTHAM: Just briefly, Your Honor, the State is asking that the Court find aggravating factor (F)(5). Mr. Hazelton was referring to (F)(4).

Also, the indictments on this defendant are subsequent to the date of the sentencing and that is all that is required by 26.14 as to whether the conduct was inappropriate -- or the sentencing was inappropriate.

I think a distinction had to be made and I think Mr. Hazelton was trying to blur that distinction. The Court can

consider the subsequent conduct of the defendant. The indictment for murder in Indiana and the indictments for conspiracy in Florence, the Court can consider those matters for determining whether the original life sentence was inappropriate. But it cannot consider those matters for this sentencing as far as an aggravating factor.

Now, Mr. Hazelton also argued and cites to the Court the case out of Missouri, Bullington, and says it is essentially the same as it is in Arizona and therefore Bullington should apply. That's not true. And he alluded to the main difference, the main difference in Missouri is the jury first has one trial to determine the man's guilt and then a whole new and seperate trial to determine the sentence. So the double jeopardy

situation can be clearly seen because he has two trials and the jury acquits him, they either find him guilty of capital murder or not guilty. And so they [R.T. 20] actually go ahead and acquit the man, there is a jury decision of acquittal in that second stage.

Arizona is completely different. The jury decides the guilt, and then the Court reviews the aggravating factors and makes a determination after a hearing. So Bullington does not apply to what we are talking about.

And besides that, Pearce and Bullington and DiFrancisco (sic) and all of these other matters were argued in front of the Supreme Court on this very motion and the Supreme Court was cognizant of all those problems and all the arguments and the merits to each one of those arguments,

still sent it back to this Court, telling you that there is an aggravating circumstance that you can consider and you should consider.

Now, common sense tells you that if they didn't think you had the power to resentence him to death, they would not have wasted all our time by sending this back down to you. Common sense tells you they thought about the matter, they decided, even though it's not in the opinion, but they decided you do have the power, and they were remanding it back to you to make the decision with the instructions that they think, at least -- at least one aggravating circumstance applies.

Now, Mr. Hazelton talks about a new mitigating circumstance that you can and should consider, that being a felony

murder case. Mr. Hazelton argued that previously at the past aggravating and mitigation hearing. That was the [R.T. 21] sole reason why he brought the foreman on to testify, was to tell you that, yes, they deliberated and they came back on the felony murder instruction. He was in a sense arguing to you that that was mitigating and that you shouldn't have considered -- that you should consider that as a mitigating factor. That essentially is what he is doing now. And you knew and were cognizant of the fact that it was a felony murder and yet in your special verdict you found that there were no mitigating factors. And certainly if you want to reconsider that at this late date, using the authority of Arizona v. Schad, you may consider that as a

mitigating factor if you desire. But certainly, in weighing all of the aggravating circumstances against this potentially mitigating circumstance, the mitigating circumstance is not substantially sufficient to call for leniency, considering all the heinous conduct and all the ugly facts of this murder.

And Mr. Hazelton seems to argue that the factors in 703 cannot be used because they are elevating murder first degree from whatever to a death penalty situation. But in all cases of any aggravating factors, it's the same act or similar act being used and the constitutionality of 703 and all of these aggravating factors has been approved. These, specifically the statute, has been found constitutional by the Supreme Court

at least eight or nine different times on each one of these various aggravating factors. And simply what they are doing is [R.T. 22] they are separating out the common run of the mill murder, I suppose, from these particular murderers that deserve the death penalty. And the Legislature has determined in its wisdom that armed robbery murderers are murderers that we want to give the death penalty to, or at least the discretion. It's one of the factors that has to be weighed.

The Legislature has so spoken. The Supreme Court has affirmed. And it is up to you to weigh all of these factors, and I think that the Court should find that the death penalty is appropriate and should indeed sentence the Defendant to death.

MR. HAZELTON: Just briefly, Your Honor, Mr. Hotham referred to my arguing the felony murder as a mitigating circumstance in the prior pre-sentence hearing. I don't believe I did and my memorandum entitled "Mitigation Memorandum", does not discuss that.

The only reason I brought the jury foreman in at that hearing, Your Honor, was to argue, and I have to admit now I argued unsuccessfully that any sentence for the armed robbery must run concurrently with the sentence for the murder. And that's why I brought that in and I had a separate memorandum that I had written on that issue. I don't believe I did argue it to the Court.

THE COURT: Anything further, Counsel?

MR. HOTHAM: No, Your Honor. [R.T. 23]

MR. HAZELTON: No, Your Honor.

THE COURT: Okay. I would like to see Counsel in Chambers for a few moments.

And deputies, if you would keep Mr. Rumsey here until we are finished in Chambers, I would appreciate it. Thank you.

(Whereupon, a recess ensued.)

* * * * * *

[Certificate omitted in printing.]

[R.T. 24]

Special Verdict at Resentencing
February 4, 1982

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	NO. CR-109802
	)	
DENNIS W. RUMSEY,	)	SPECIAL VERDICT
	)	
DEFENDANT.	)	
	)	

As to aggravating circumstances, the Court finds the following:

1. The defendant has not been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant has not been previously convicted of a felony in the

United States involving the use or threat of violence on another person.

3. In the commission of the offense, the defendant did not create a grave risk of death to another person in addition to the victim of the offense.

The Court does find that the defendant did create a risk of death to another person, other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

4. The defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The defendant did commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value in that "the hope of financial gain was a cause of the

murder" State v. Rumsey, filed November 4, 1981, No. 5042.

6. The State has urged the Court to find that the offense was committed in an especially heinous, cruel and depraved manner. The Court has reviewed all of the cases cited by the State. The Court again finds that the facts of the actual shooting incident itself in this case and the facts of the actual shooting incident in State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) are very analogous. In Brookover, our Supreme Court specifically found the murder was not committed in an "especially heinous, cruel and depraved manner."

This Court therefore finds that the defendant, Dennis W. Rumsey, did not commit the offense in an especially heinous, cruel or depraved manner.

7. The defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution.

There was some evidence of alcohol and/or drug intoxication. There was substantial evidence that such intoxication did not affect defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. The defendant was not under unusual or substantial duress. In fact, there was no evidence of duress at all.

3. The defendant was the individual who actually committed the offense and was not found guilty by reason of being legally accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The defendant could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or create grave risk of causing, death to another person.

5. The defendant was barely 19 years of age at the time of the offense. However, the defendant was wise beyond his years as it relates to what occurred

in this case. The Court, therefore, does not find age to be a mitigating factor.

6. The defense has urged a felony murder rule conviction as a mitigating circumstance.

Assuming the jury returned a verdict of first degree murder pursuant to the felony murder rule only and that such constitutes a mitigating circumstance, this Court under all the circumstances of the case, specifically including, but not limited to the fact that defendant rather than a companion committed the homicide, cannot find that to be a mitigating circumstance sufficiently substantial to call for leniency.

The Court having taken into account the aggravating and mitigating circumstances, the Court finds that one aggravating circumstance exists, to-wit: the offense

was committed in expectation of the receipt of something of pecuniary value; namely, money; and the Court further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

DONE IN OPEN COURT this 4 day of Feb., 1982.

_____

Judge
RUFUS C. COULTER, JR.

Pronouncement of Resentence
February 4, 1982

IN THE SUPERIOR COURT

OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CR-109802
	)	
DENNIS W. RUMSEY,	)	
	)	
DEFENDANT.	)	
	)	

Reporter's Transcript of Proceedings
Pages 1 through 8

BEFORE:
THE HONORABLE RUFUS C. COULTER, JR.,
JUDGE OF THE SUPERIOR COURT

APPEARANCES:

For the State:

MR. JEFF HOTHAM
Deputy County Attorney

For the Defendant:

MR. ARTHUR G. HAZELTON
Deputy Public Defender

Phoenix, Arizona
February 4, 1982
9:30 o'clock a.m.

(JEROME R. MALECKA was duly sworn to act as Official Court Reporter herein.)

THE COURT: CR-109802, State of Arizona versus Dennis W. Rumsey. This is the time set for resentencing.

Is the State ready?

MR. HOTHAM: The State is ready, Your Honor. Jeff Hotham appearing.

THE COURT: Is the Defendant ready?

MR. HAZELTON: Yes, Your Honor. Art Hazelton appearing with Mr. Rumsey.

THE COURT: Would you approach the Bench, please.

You are Mr. Dennis W. Rumsey?

THE DEFENDANT: Yes.

THE COURT: Mr. Rumsey, you have been charged by the State of Arizona with the crime of murder, first degree, of [R.T. 2][1] which charge you have been found guilty by a jury's verdict, which verdict has been affirmed on appeal. However,

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1. R.T. is the reporter's transcript. R.T. 2 refers to that point in this joint appendix where the second page of the reporter's transcript ends. The first page in the reporter's transcript is blank and not numbered. The end of succeeding pages in the reporter's transcript will be indicated in the same manner.

this matter has -- however, the sentence heretofore imposed has been vacated by the Supreme Court of this State and the matter has been remanded for resentencing. Do you have anything to say or any legal cause to show why resentencing should not now be imposed?

THE DEFENDANT: No.

THE COURT: Counsel.

MR. HAZELTON: Your Honor, I already argued to the Court at the sentencing hearing. And I would urge the Court to resentence the Defendant as I argued thereto, life imprisonment. I believe that is the only lawful sentence the Court can impose.

THE COURT: Mr. Rumsey, are you in any way unhappy or dissatisfied with the services or representation that's been provided to you by your attorney?

THE DEFENDANT: No.

THE COURT: There is no legal cause?

MR. HAZELTON: No, Your Honor.

THE COURT: The Court's special verdict reads as follows:

"As to aggravating circumstances, the Court finds the following:

1. The Defendant has not been convicted of another offense in the United States for which under Arizona [R.T. 3] law a sentence of life imprisonment or death was imposable.

2. The Defendant has not been previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense, the Defendant did not create a grave risk of death to another person in addition to the victim of the offense. The Court does find that the Defendant did create a

risk of death to another person, other than the victim, namely, Kimberly Holmes, but not a grave risk as required by the statute.

4. The Defendant did not procure the commission of the offense by the payment or promise of payment of anything of pecuniary value.

5. The Defendant did commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value in that the hope of financial gain was a cause of the murder."

And in support of that, I cite State v. Rumsey filed November 4, 1981, No. 5042.

"6. the State has urged the Court to find that the offense was committed in an especially heinous, cruel and depraved manner. The Court has reviewed all of

the cases cited by the State. The Court again finds that the facts of the actual shooting incident itself in this case and the facts of the actual shooting incident in State v. Brookover, 124 Ariz. [R.T. 4] 38, 601 P.2d 1322, are very analogous. In Brookover, our Supreme Court specifically found the murder was not committed in an especially heinous, cruel and depraved manner. This Court therefore finds that the Defendant, Dennis W. Rumsey, did not commit the offense in an especially heinous, cruel or depraved manner.

7. The Defendant did not commit the offense while in the custody of the Department of Corrections, law enforcement agency or a county or city jail.

As to mitigating circumstances, the Court finds the following:

1. The Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not significantly impaired and certainly not so impaired as to constitute a defense to the prosecution. There was some evidence of alcohol and/or drug intoxication. There was substantial evidence that such intoxication did not affect the Defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

2. The Defendant was not under unusual or substantial duress. In fact, there was no evidence of duress at all.

3. The Defendant was the individual who actually committed the offense and was not found guilty by reason of

[R.T. 5] being legally accountable for the conduct of another under the provisions of A.R.S. 13-303. Therefore, this mitigating circumstance does not exist.

4. The Defendant could reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause or create a grave risk of causing death to another person.

5. The Defendant was barely 19 years of age at the time of the offense. However, Defendant was wise beyond his years as it relates to what occurred in this case. The Court, therefore, does not find age to be a mitigating factor.

6. The Defense has urged a felony murder rule conviction as a mitigating circumstance.

Assuming the jury returned a vedict of first degree murder pursuant to the felony rule only and that such constitutes a mitigating circumstance, this Court under all the circumstances of this case, specifically, including, but not limited to the fact tht the Defendant rather than a companion committed the homicide, cannot find that to be a mitigating circumstance sufficiently substantial to call for leniency.

The Court having taken into account the aggravating and mitigating circumstances, the Court finds that one aggravating circumstance exists, to wit: this offense was committed in expectation of the receipt of something of pecuniary [R.T. 6] value; namely, money; and the Court further finds that there are no mitigating circumstances sufficiently substantial to call for leniency."

No legal cause appearing, as punishment for the crime of first degree murder, it is ordered that you suffer the penalty of death to be inflicted by lethal gas under the supervision of the Department of Corrections.

Sir, you have the right to appeal and in fact by law it is mandatory and the Clerk is hereby directed pursuant to Rule 1626.15 (sic) to file a notice of appeal to the Supreme Court of this State.

You have the right to be represented by an attorney in connection with that appeal, and if you cannot afford one, one will be appointed for you by the Court at no expense. You have the right to a complete transcript of the entire proceedings, and again, if you cannot afford such a transcript, same will be supplied to you by the Court at no expense to you.

Do you understand your rights to appeal?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights to appeal?

THE DEFENDANT: No.

THE COURT: My bailiff will supply you with a copy of your rights to appeal. I want you to sign it, leave the [R.T. 7] original with her and keep a copy for yourself before you leave here this morning.

I have copies of the verdict for Counsel if you want them in Chambers.

The Court will stand at recess.

(Whereupon, a recess ensued.)

* * * *

[Certificate omitted in printing.]

[R.T. 8.]

Judgment and Sentence upon Resentencing

February 4, 1982

IN THE SUPERIOR COURT
OF
MARICOPA COUNTY, STATE OF ARIZONA

A-C Feb. 4, 1982 RUFUS C. COULTER, JR.
DIV DATE JUDGE OR COMMISSIONER

State of Arizona — County Attorney By: Jeff

Hotham
vs.
A.P.O.

DENNIS WAYNE RUMSEY — Arthur Hazelton

(P.D.)

Sheriff's Office

D.O.C.

Clerk of Court, Cr. Judgments

This is the time set for resentencing. State is represented by Jeff Hotham; Defendant Dennis W. Rumsey is present with counsel Arthur Hazelton.

Court Reporter: JERRY MALECKA.

The defendant is advised of the charges, the determinations of guilt and is given an oportunity to speak.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the crime of Count I, Murder, First Degree, Class 1 felony, committed on October 10, 1979 in violation of A.R.S. 13-1107, 1101, 604, 703, 1901, 1902, 1904.

As to Count I, the Special Verdict is read by the Court and is filed.

There being no legal cause to delay.

ORDERED as to Count I that the Defendant be punished for Count I by death by the administration of lethal gas under the supervision of the Department of Corrections.

ORDERED directing the Clerk of the Court to send to the Department of Corrections along with the sentencing order, copies of all presentence reports, probation violation reports, medical and mental health reports prepared as to or relating to this Defendant.

ORDERED that the Defendant is remanded to the custody of the Sheriff of Maricopa County and that the Sheriff is ordered to deliver the Defendant to the Department of corrections (sic) together with a signed, certified copy of this judgment and sentence so that the Department of Corrections may carry out the sentences just imposed.

ORDERED directing the Clerk of the Superior Court of Maricopa County to file a Notice of Appeal from this judgment and sentence.

ORDERED appointing Mr. Arthur Hazelton to represent the Defendant on his appeal.

ORDERED directing the Sheriff of Maricopa County to return the Defendant, Dennis W. Rumsey, to the Department of Corrections, the resentencing procedure for which the Defendant was returned to this Division having been concluded.

RUFUS C. COULTER, JR.

(3583D, 3592D)

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Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSS P. LEE
Maricopa County Public Defender

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132 South Central Ave., Second Floor
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Attorneys for RESPONDENT

QUESTION PRESENTED FOR REVIEW

Does the Arizona capital sentencing procedure resemble a trial, thus rendering a life sentence an implicit acquittal of the death penalty, which would bar a subsequent imposition of the death penalty on double jeopardy grounds?

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STATEMENT OF THE CASE

Respondent Dennis Rumsey was charged by an Information filed December 6, 1979 with Armed Robbery and First Degree Murder.

At trial, one Kimberly Holmes testified that in October, 1979, she and Respondent were hitchhiking to Respondent's parents' home in Las Vegas. They were picked up by the victim, George Koslosky, in New Mexico or Texas. They stopped in Phoenix, where Respondent and the victim went into a store to buy some beer. Upon returning to the automobile, Respondent told his companion that the victim had over three hundred dollars ($300.00), and that he was going to rob the victim. Upon leaving Phoenix, Respondent was driving and the victim was sleeping in the back. After driving approximately forty-five minutes, Respondent pulled over to the side of the road, and awakened the victim. He ordered the victim at gunpoint to empty his pockets and get into the trunk. The victim refused, and Respondent eventually shot the victim twice and dragged him to the side of the road.

Respondent testified in his own behalf that he had never discussed robbing George Koslosky. Upon leaving Phoenix, he testified, the victim was driving the car, and Respondent passed out in the back seat from consuming alcohol and depressant drugs. Some time later, he awoke to find Kimberly driving the car, shaking and crying. She told him she had shot the victim because he had tried something with her when she had stopped the car to get aspirin from the trunk. Respondent admitted having told his brother in Las Vegas that it was he who shot the man, but explained that he had only done so to prevent Kimberly from being charged.

On June 6, 1980, Respondent was convicted of Armed Robbery and First Degree Murder. On July 3, 1980, the trial court conducted a sentencing hearing as required by A.R.S. §13-703. In its effort to prove aggravating circumstances, the state relied on evidence already presented at trial. Respondent called as a witness the foreman of the trial jury, who testified that the jury had rejected the premeditation theory, and had convicted Respondent based on the felony-murder rule, and that the jurors felt a life sentence was appropriate.

On July 7, 1980, the trial court announced its special verdict, finding that there were no aggravating and no mitigating circumstances. One specific aggravating factor which the trial court found did not exist was that the offense was committed as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value. A.R.S. §13-703(F)(5). Contrary to the position the state took at the sentencing hearing, the trial court found that when §13-703(F)(5) is read together with §13-703(F)(4), it is meant to apply to contract-type killings, not to killings during robberies.

Because the trial court found that no aggravating circumstances were proven, the court was required to impose a sentence of life imprisonment without parole for twenty-five years. The trial court also imposed a sentence of twenty-one years on the armed robbery charge, to run consecutively to the sentence imposed on the murder.

Respondent appealed, arguing that the imposition of consecutive sentences was improper; the state cross-appealed, arguing that the trial court erred in ruling on a question of law by finding A.R.S. §13-703(F)(5) inapplicable to Respondent's case. The consecutive sentences were affirmed by the Arizona Supreme Court. State v. Rumsey, 130 Ariz. 427, 636 P.2d 1209 (1981). The court further ruled that, based on State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), which was decided eighteen days after Respondent's sentencing, the trial court had erred in ruling that A.R.S. §13-703(F)(5) only applied to murder for hire situations. (Id.) The sentence of life imprisonment on the murder charge was set aside, and the matter remanded for redetermination of aggravating and mitigating circumstances and resentencing on that charge.

On remand, the trial court held another sentencing hearing under A.R.S. §13-703. No further evidence was presented, both parties relying on the evidence presented at trial and the first sentencing hearing. Respondent argued that this Court's opinion in Bullington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prohibited the trial court from imposing the death penalty after having previously sentenced Respondent to life. On February 4, 1982, the trial court announced its finding that the only aggravating circumstance was that the offense was committed for pecuniary gain under A.R.S. §13-703(F)(5). The trial court

found no mitigating circumstances, and ordered that Respondent suffer the penalty of death as required under A.R.S. §13-703(E).

The death sentence was appealed automatically under 17 A.R.S., Rules of Criminal Procedure, Rule 31.7. A number of issues were raised by Respondent on appeal; however, the Arizona Supreme Court limited its discussion to whether, under the Bullington v. Missouri, supra, analysis, the Arizona capital sentencing procedure is effectively a trial. State v. Rumsey, ___ Ariz. ___, 665 P.2d 48 (1983). The court found that it is, and that as a result, Respondent's original life sentence amounted to an acquittal of the death penalty. (Id.) A subsequent sentence of death, the court held, would violate the double jeopardy provisions of the Fifth Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT.

Petitioner contends that the question decided by the Arizona Supreme Court is a question of federal law which has not been decided by this Court. Respondent submits that Petitioner's analysis in this regard is misdirected. Petitioner views the question presented herein in the following way: "May the Arizona Supreme Court vacate an erroneous life sentence based upon a legal error and remand for resentencing to correct the trial court error?" (Petition for Writ of Certiorari, p. 11). Respondent respectfully submits to this Court that the question formulated by Petitioner misses the true question: Is Arizona's capital sentencing hearing effectively a trial? That question must be answered in order to answer the question formulated by Petitioner. When viewed in this way, it is clear that the only question of federal law involved herein has already been decided by this Court in Bullington v. Missouri, supra. In Bullington, this Court held that when a capital sentencing procedure resembles a trial, a sentence to life imprisonment under that procedure amounts to an acquittal as to the death penalty, preventing the later imposition of the death penalty. In the present case, the only decision the Arizona Supreme Court was required to make was an

interpretation of state law: Does the Arizona capital sentencing hearing resemble a trial? The Arizona court answered the question affirmatively, stating:

> In Arizona, as in Missouri, a special procedure is applicable to capital cases. The resemblance of this procedure to trial is apparent on examination of A.R.S. §13-703.
>
> ___ Ariz. at ___, 665 P.2d 48, at 53. (Emphasis added.)

Once the Arizona court made that determination, its action was directed by Bullington.

Petitioner contends that the Rumsey decision will affect similar resentencings in three states other than Arizona. Respondent submits that in fact it is up to the courts of those three states to determine if their sentencing procedures resemble a trial, and apply Bullington accordingly. Petitioner further contends that appellate courts in Arizona and the other three states will be hampered in reviewing life sentences which have been "erroneously or illegally imposed." In actuality, however, the Arizona Supreme Court does not review life sentences as it does death sentences. As the Arizona Supreme Court pointed out in its second opinion herein, although death penalty cases are automatically appealed to the Arizona Supreme Court, no appeal is required when a life sentence is imposed, and the state is not permitted an appeal unless the defendant has appealed. 665 P.2d 49, at 55, n. 10. The Arizona court further points out that it performs an independent review and proportionality review of cases in which the death penalty was imposed to determine if that sentence is excessive or disproportionate; it does not review life sentences to determine whether they are too lenient. 665 P.2d 48, at 55.

In summary, the decision of the Arizona Supreme Court herein did not constitute a decision of a federal question not previously decided by this Court, nor was it a decision that will affect cases or hamper review in Arizona and three other states. It was simply an interpretation of state law in answer to the question: Does the sentencing hearing described in A.R.S. §13-703 resemble a trial? The Arizona Supreme Court has held that it does. This Court has long held that it is bound to accept the interpretation of state law by the highest court of the state. Hortonville J.S.D. No. 1 v. Hortonville Ed., 426 U.S. 482, 488, 96 S.Ct. 2308, 2312, 49 L.Ed.2d 1 (1976); Groppi v. Wisconsin, 400 U.S. 505, 507, 91 S.Ct.

490, 492, 27 L.Ed.2d 571 (1971); Aero Mayflower Transit Co. v. Board of Railroad Com'rs, 332 U.S. 495, 499-500, 68 S.Ct. 167, 169, 92 L.Ed. 99 (1947).

For the above reasons, this Court should deny the Writ requested by Petitioner.

II. BECAUSE THE ARIZONA CAPITAL SENTENCING HEARING RESEMBLES A TRIAL, THE ARIZONA SUPREME COURT WAS CORRECT IN APPLYING THE DOUBLE JEOPARDY CLAUSE TO APPELLANT'S RE-SENTENCING.

Petitioner characterizes the issue presented here as a narrow one. With that Respondent would agree. When the issue is distilled down to its essential components, it is narrow indeed. Bullington v. Missouri, supra, states that when a capital sentencing resembles a trial, double jeopardy applies; the Arizona Supreme Court has held that the Arizona capital sentencing hearing resembles a trial. It is with this determination by the Arizona court that Petitioner takes issue.

Petitioner attempts to distinguish the Arizona sentencing scheme from Missouri's in eight different ways. Petitioner first points out that, unlike Missouri, Arizona has no jury involved in the sentencing. This distinction is not relevant to the question of whether the double jeopardy clause should apply. As the Arizona court pointed out in its unanimous opinion, "For purposes of double jeopardy, it has never made a difference whether a case was tried before a judge or a jury. See, United States v. Morrison, 429 U.S. 1, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976) . . . ." 665 P.2d at 54.

Petitioner next points out that there are seldom live witnesses in an Arizona sentencing hearing. Again, this point is not relevant to the double jeopardy inquiry. Double jeopardy protection is afforded to a defendant on a criminal charge even though he may choose to submit the case for a decision by the trial court based on previous testimony or stipulated exhibits.

Petitioner's third and fourth points are that the Arizona statute does not require opening statements, and permits but does not require closing arguments. Again, these points are not relevant to the double jeopardy issue, since at a trial on the issue of guilt or innocence either or both parties may waive opening statement or closing argument without affecting the defendant's rights under the Double Jeopardy Clause.

The next distinction raised by Petitioner is that no instructions to the factfinder are required by the Arizona statute. Again, this has no effect on double jeopardy considerations. At a trial to the court on the issue of guilt or innocence, no instructions are required, as the court is presumed to know the law. The parties may, of course, argue the law to the court at the sentencing hearing, as is done quite regularly.

The sixth point argued by Petitioner is that although aggravating circumstances must be shown beyond a reasonable doubt, mitigation sufficient to call for a life sentence need not be shown beyond a reasonable doubt. Petitioner forgets that this is almost precisely the burden of proof which exists at a trial on guilt or innocence: The state must prove all of its case beyond a reasonable doubt. A defendant need not prove his innocence beyond a reasonable doubt. For instance, if a defendant argues alibi, he need not prove that alibi beyond a reasonable doubt, he need only raise some reasonable doubt that he is the guilty party.

The seventh argument raised by Petitioner is that evidence regarding aggravation is governed by the rules of evidence, while there is no such limitation on mitigation. Respondent submits that as the Arizona Supreme Court said, this distinction is insignificant. 665 P.2d 48, at 54. As the Arizona court pointed out, the distinction is true only of mitigating evidence presented at the sentencing hearing, not of mitigating evidence presented at trial. Id. Assuming the truth of Petitioner's statement that there are seldom live witnesses in an Arizona sentencing hearing, this distinction is particularly insignificant.

Petitioner's final distinguishing point, raised separately from the rest, is that the Missouri statute permits a jury to be lenient. The Missouri jury can give a life sentence even though they find the necessary aggravation for the death penalty and the lack of sufficient mitigation. This is prohibited in Arizona, since the Arizona statute makes the death penalty mandatory when the trial court finds aggravating factors, but insufficient mitigating factors. Somehow, Petitioner believes this distinction makes Missouri procedure more like a trial than Arizona's. Quite clearly, the precise opposite is true. Juries who decide the issue of guilt or innocence are never instructed that they may find a defendant not guilty, despite having found that the state proved his guilt beyond a reasonable doubt. In this respect, Arizona's procedure is far more like a trial than Missouri's.

Petitioner further contends that the capital sentencing procedure in Arizona is not a "final step" because the Arizona Supreme Court conducts an independent review of each case in which the death penalty is imposed. Petitioner's argument might have some validity if the Arizona Supreme Court independently reviewed both death penalties and life sentences imposed after capital sentencing hearings. However, as Petitioner candidly admits, the Arizona court has never increased a life sentence to death. The reason for this was clearly articulated in the unanimous opinion in the second Rumsey decision:

> We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty. Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." State v. Richmond, 114 Ariz. at 196, 560 P.2d at 51. In capital cases "we necessarily undertake an independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances . . . [to] determine for ourselves if the latter outweigh the former . . . ." Id. (citations omitted). Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." Id.
>
> 665 P.2d at 55 (Footnote omitted.)

The court further stated:

> We hold, therefore, that the Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by the utilization of this court's appellate process to make a conscientious review on a statewide basis in order to assure rationality and "evenhanded operation" in the imposition of the death penalty. This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life.
>
> 665 P.2d at pp. 55-56.

Petitioner also argues that the state "proved its case" at Respondent's original sentencing hearing, and that, therefore, allowing the state supreme court to "correct" the "erroneous" sentence would not violate the Double Jeopardy clause. Petitioner's position is not fully supported by the facts. After the original sentencing hearing, the trial court's special verdict announced the finding that there were no aggravating circumstances. Thus, the state failed to prove its case at the original sentencing hearing. It is true that eighteen days after Respondent's sentencing the Arizona Supreme Court issued an opinion in another case which disagreed with the trial court's ruling that A.R.S. §13-703(F)(5) did not

apply to murders which occur during a robbery. State v. Clark, supra. That, however, is irrelevant to double jeopardy considerations. The trial court's finding that there were no aggravating circumstances was a finding that the state failed to prove its case, and amounted to an acquittal of the death penalty. No matter how erroneous an acquittal may be, even though based on an incorrect interpretation of law, it cannot be overturned on appeal. Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 67, 7 L.Ed.2d 629 (1962).

Petitioner contends that the present case is similar to United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1012, 43 L.Ed. 232 (1975), in which this Court held that the Double Jeopardy Clause permitted overturning a post-verdict acquittal. In fact, Wilson is plainly distinguishable from Respondent's case. In Wilson, the jury had returned a verdict of guilty. After that verdict, the trial court dismissed the indictment on the grounds that the government had caused unwarranted pre-indictment delay which prejudiced the defendant. The government appealed from the trial court's post-verdict ruling. This Court held in Wilson that the government's appeal did not violate the Double Jeopardy Clause, because should the government prevail, the original jury verdict of guilty would simply be reinstated. The facts of Wilson stand in stark contrast to the facts of the case before this Court. In the present case, there was no original special verdict finding aggravating circumstances which could be reinstated; there was no death penalty which could be reinstated. The only way that the error of which the state complained could be corrected would be to require a new hearing and a new verdict. This is unlike Wilson, where no new trial and no new verdict were required. This distinction is precisely the ground upon which this Court held the government's appeal in Wilson to be permissible, and is precisely the reason that imposition of the death penalty at Appellant's resentencing was a violation of the Double Jeopardy Clause.

Petitioner has cited Fitzpatrick v. State, ___ Mont. ___, 638 P.2d 1002, cert. denied, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 118 (1981), stating that Montana's death sentencing procedures are similar to Arizona's, and that the Montana Supreme Court held its procedure to be unlike a trial. Fitzpatrick is readily distinguishable from the present case on some major points. The Montana

court stated, in distinguishing their procedure from Missouri's, that the Montana procedure does not require proof beyond a reasonable doubt, and gives the judge wider discretion in imposing a sentence other than death. 638 P.2d 1002, at 1017. Arizona does, of course, require proof beyond a reasonable doubt, and directs the judge quite precisely as to when the death penalty shall be imposed and when a life sentence shall be imposed.

The Arizona capital sentencing procedure carries the major hallmarks of a trial: the sentencing judge does not have a wide range of penalties to choose from, only two; there are specific standards governing that choice; and the burden is on the state to prove certain aggravating factors beyond a reasonable doubt before the death penalty can be imposed. The Arizona Supreme Court was correct in determining that the Double Jeopardy Clause applied to Respondent's sentencing, and that it barred the trial court from resentencing him to death after previously sentencing him to life.

CONCLUSION

The case before this Court does not present a question of federal law which has not been settled by this Court. The only question decided by the Arizona Supreme Court was one of state law, i.e., that the Arizona capital sentencing procedure amounts to a trial. Further, the Arizona Supreme Court was correct in determining that said sentencing procedure is effectively a trial, because that sentencing procedure includes the significant hallmarks of a trial on the issue of guilt or innocence. For those reasons, the writ of certiorari to the Arizona Supreme Court should be denied.

RESPECTFULLY SUBMITTED,

ROSS P. LEE
Maricopa County Public Defender

By _____
JAMES R. RUMMAGE
Deputy Public Defender
Attorney for Respondent
132 South Central, 2nd Floor
Phoenix, Arizona 85004

ORIGINAL

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NO. 83-226

IN THE SUPREME COURT OF THE UNITED STATES
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STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, DENNIS WAYNE RUMSEY, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached Brief In Opposition To Petition For Writ Of Certiorari to the Arizona Supreme Court without pre-payment of costs and to proceed in forma pauperis. The Respondent was represented by the Maricopa County Public Defender's Office, of which the undersigned is a member, in the Superior Court of Maricopa County, and on appeal to the Arizona Supreme Court. The Respondent's Affidavit in support of this motion is attached hereto.

Respectfully submitted this 9th day of September, 1983.

ROSS P. LEE
Maricopa County Public Defender

By _____
JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711
Attorney for Respondent

No. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

AFFIDAVIT

I, Dennis Wayne Rumsey, being first duly sworn according to law, depose and say, that I am the Respondent in the above-entitled case; that I am currently incarcerated in the Arizona State Prison; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am not presently employed; that my only income in the past twelve months was ten dollars given to me by my mother; that I do not own any cash, checking or savings accounts, nor any valuable property; that both before the state trial court and on appeal, I was represented by appointed counsel; that I believe the State of Arizona is not entitled to the redress sought in this case; the nature of said cause is briefly stated as follows:

I was sentenced to a life term in the Arizona Department of Corrections on a charge of Murder, First Degree. On remand for resentencing, I was sentenced to suffer the penalty of death. On appeal, the Arizona Supreme Court set aside the death penalty on the ground that its imposition at resentencing violated the provisions of the Double Jeopardy clause. In this proceeding, the state is seeking to have the death penalty reinstated.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

DENNIS WAYNE RUMSEY

SUBSCRIBED AND SWORN TO before me this 9th day of September, 1983.

Notary Public

My Commission Expires:

My Commission Expires Dec. 8, 1985

William H. Brithart

NO. 83-226

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that one copy of the Motion For Leave To Proceed In Forma Pauperis and Affidavit, the Brief In Opposition To Petition For Writ Of Certiorari to the United States Supreme Court, and the Certificate of Service were served on each of the following persons by depositing the copies in a United States post office, with first-class postage prepaid, on this 9th day of September, 1983:

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NO. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,
Petitioner,

-vs-

DENNIS WAYNE RUMSEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

IN A STATE WHERE IN THE CAPITAL SENTENCING PROCEDURE THE TRIAL COURT IS REQUIRED TO IMPOSE A SENTENCE OF DEATH IF THE STATE PROVES THE EXISTENCE OF ONE OR MORE AGGRAVATING FACTORS AND THE DEFENDANT FAILS TO PROVE ANY MITIGATING FACTORS, IF THE TRIAL COURT ERRS AS A MATTER OF LAW AND CONCLUDES THAT THE FACTS PROVED BY THE STATE DO NOT ESTABLISH AN AGGRAVATING CIRCUMSTANCE, MAY THE STATE APPELLATE COURT VACATE THE LIFE SENTENCE AND REMAND FOR A RESENTENCING WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION?

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OPINIONS BELOW

The 1983 Arizona Supreme Court opinion holding that a resentencing of Rumsey is precluded by the double jeopardy clause is reported in 136 Ariz. 175, 665 P.2d 48 (1983). The Arizona Supreme Court opinion remanding the Rumsey case for resentencing is reported in 130 Ariz. 427, 636 P.2d 1209 (1981).

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court holding that resentencing Rumsey was precluded by the double jeopardy clause was entered on April 14, 1983. The state's motion for rehearing before the Arizona Supreme Court was denied on June 14, 1983. A petition for writ of certiorari was filed by the State of Arizona within 60 days from that denial. The petition was granted by this Court on

January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> (N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> (N)or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On December 6, 1979, Dennis Rumsey was charged with armed robbery and first-degree murder. In October, 1979, Mr. Rumsey and a female companion were

hitchhiking when George Koslosky picked them up. When all three stopped to buy some beer, Rumsey noticed that Koslosky had money and he told his companion he was going to rob Koslosky. Later, while Rumsey was driving Koslosky's vehicle, he pulled off the road, woke Koslosky, who was sleeping in the backseat, and, at gunpoint, ordered him to empty his pockets. Rumsey then shot Koslosky and left him beside the road.

Rumsey went to trial before a jury in June of 1980. He was convicted of armed robbery and first-degree murder and, on July 3, 1980, in accord with Ariz.Rev.Stat.Ann. § 13-703, a hearing to determine sentence was held before the trial court. (J.A. 1-52.) As is permitted by statute, the state cited evidence adduced at trial to show that the following three statutory aggravating

circumstances existed: (1) Rumsey "created a grave risk of death to another"[1]; (2) Rumsey committed the offense expecting pecuniary gain[2]; and (3) Rumsey committed the crime in an "especially heinous, cruel or depraved manner"[3]. (J.A. 11, 14, 23.) In mitigation[4] Rumsey presented the foreman of the trial jury as a witness. He testified that the murder verdict rested on the felony-murder theory advanced by the state and added that the jurors felt a life sentence was appropriate. (J.A. 7, 9.) Four days later, July 7, 1980, the trial court decided that Rumsey's acts had not

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1. Ariz.Rev.Stat.Ann. § 13-703(F)(3).
2. Ariz.Rev.Stat.Ann. § 13-703(F)(5).
3. Ariz.Rev.Stat.Ann. § 13-703(F)(6).
4. Ariz.Rev.Stat.Ann. § 13-703(G).

created a grave risk of death to another, that Rumsey did not commit the offense in an especially heinous, cruel or depraved manner, and although the murder-robbery was committed for pecuniary gain that statutory circumstance was not applicable to Rumsey because it applied only to hired killers and was not meant to reach those who murdered to rob. (J.A. 53-57.) Also, the trial court decided that Rumsey had shown no mitigation. Because the court found no aggravating circumstances, the court could not impose a death sentence under Arizona law.[5] Rumsey was sentenced to life for the murder and 21 years for the robbery, the robbery sentence to run consecutively to the life sentence. (J.A. 72-73.)

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5. Ariz.Rev.Stat.Ann. § 13-703(E).

Three weeks after the sentencing, the Arizona Supreme Court, in an unrelated case, State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980), cert. denied, 449 U.S. 1067 (1981), ruled that the pecuniary gain aggravating circumstance was not limited to hired killers and that it did apply to those who robbed for pecuniary gain as Rumsey had.

Both Rumsey and the state appealed from the July 7, 1980, sentences. Rumsey appealed the imposition of consecutive sentences[6]; the state appealed from the imposition of a life sentence[7]. Then on December 8, 1981, the Arizona Supreme Court vacated Rumsey's life sentence for murder and remanded for resentencing on

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6. Ariz.Rev.Stat.Ann. § 13-4033.

7. Ariz.Rev.Stat.Ann. § 13-4032.

the first-degree murder conviction. The basis for the supreme court's ruling was that the trial judge had "erred in holding as a matter of law that it could not find as an aggravating circumstance that the murder was for monetary gain." State v. Rumsey, 130 Ariz. 427, 431-32, 636 P.2d 1209, 1213-14 (1981).

On February 1, 1982, the same trial judge who originally sentenced Rumsey held a second sentencing hearing. No evidence was presented by either party but both counsel argued. The state argued that the trial court was free to find that the crime had been committed for pecuniary gain and free to impose a death sentence. Rumsey argued that Bullington v. Missouri, 451 U.S. 430 (1981), prevented the court from imposing a death sentence. (J.A. 99-102, 110-12.) On February 4 the trial court

found that one aggravating circumstance existed, Rumsey had committed the crime for pecuniary gain. The court also found that no mitigation had been shown and imposed a death sentence. (J.A. 118-24.)

Appeal of the death sentence to the Arizona Supreme Court was automatic under Rule 31.7, Arizona Rules of Criminal Procedure. On April 14, 1983, that court ruled that the interpretation this Court placed upon the double jeopardy clause in Bullington prevented the trial court from imposing a death sentence once it had imposed a life sentence. State v. Rumsey, 136 P.2d 175, 665 P.2d 48 (1983).

SUMMARY OF ARGUMENT

The Arizona Supreme Court decision that Dennis Rumsey may not be resentenced to death after receiving a life sentence is based solely upon its conclusion that

Bullington v. Missouri, 451 U.S. 430, required that result. The Arizona Supreme Court compared the Missouri and Arizona sentencing procedures, found that they had a number of similar provisions and concluded that, although there were differences, there were not enough to distinguish the two and held that the life sentence had to be treated as an acquittal of a death sentence. That analysis, however, is faulty for it places too much emphasis on the framework and the mechanics of the systems and overlooks the reason why the Double Jeopardy Clause insists upon finality where there is an acquittal.

The overriding objective of the Double Jeopardy Clause is to guard against government oppression. In particular, the Clause protects a citizen from repeated attempts by the state to convict

him of an offense. If a citizen is acquitted after trial he may not be tried again. The state had its opportunity to prove its case, it did not, and it will not be given a second chance. But this quality of finality has not been traditionally applied to sentences. The pronouncement of a sentence has not been viewed as an acquittal of any higher sentence. Thus, a sentence once pronounced may be changed, increased and appealed by the government. The Bullington decision, however, alters that tradition and in some situations treats the pronouncement of a sentence as an acquittal of a higher sentence. At least where the system that produced a death penalty is nothing more than a part of the trial on guilt, Bullington equates the pronouncement of a sentence with an acquittal on guilt.

But Bullington did not involve, as this case does, a contention that there was error prejudicial to the state at the first sentencing proceeding. Just as important as the double jeopardy protection against the state taking a second bite at the apple, is the opportunity accorded the state to present its case and have the issues determined by the factfinder or sentencer free from error. There is no government oppression involved where the state seeks only that one opportunity to present its case error free. Thus, this Court has said, consistent with the Double Jeopardy Clause, that the state may appeal from legal error at trial or sentencing and may have that error remedied, as long as there has not been an acquittal. United States v. DiFrancesco, 449 U.S. 117; United States v. Scott, 437 U.S. 82. In

this case that is all the state sought. Bullington does not prevent that.

Even if Bullington was meant to apply to situations like Rumsey's and to bar a state from having its proof considered free from legal error, there are significant differences between the Arizona and Missouri procedures that distinguish the two and do not require Arizona to follow Bullington. Those things that are the hallmarks of a jury trial and which are part of the statutory procedure in Missouri are not part of Arizona's procedure. In Arizona at sentencing there is no jury, there are no closing arguments, there are no instructions to the jury, the rules of evidence are followed only part of the time, and sympathy and compassion have no part in the sentencing process. Moreover, Arizona does not treat the

pronouncement of a sentence like an acquittal on guilt. The state may appeal errors of law that occurred during a trial and it may appeal a sentence that is too lenient. Except for the range of sentences available, a death sentencing proceeding in Arizona is like any other sentencing.

If this Court meant in Bullington to carve out an exception to the rule that the pronouncement of a sentence is not final, then it should consider overruling Bullington. Bullington is after all an aberration and it creates an area of uncertainty in the law of double jeopardy because the finality of new sentences can be judged only by how similar the system that produced them is to Missouri's procedure.

ARGUMENT

The issue in this case is a narrow one. Dennis Rumsey was found guilty of first-degree murder. If, at the subsequent sentencing hearing, the trial court found the existence of one of the statutory aggravating circumstances and found no mitigating circumstances, the court was required to impose a death sentence. At that hearing, the state proved the existence of one aggravating circumstance, that Rumsey murdered the victim to rob him, a murder for pecuniary gain. Although Rumsey could show no mitigation, he received a life sentence because the court erroneously concluded that the statutory aggravating circumstance of pecuniary gain applied only to hired killers.[8]

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8. To raise Rumsey's armed robbery sentence from the statutory presumption

The issue is whether that error may be corrected and whether a subsequent death sentence violates the Double Jeopardy Clause.

I. The pronouncement of a sentence is not an acquittal.

Government appeals in criminal cases are not prohibited by the Double Jeopardy Clause. The government may appeal from an adverse ruling during trial [United States v. Scott, 437 U.S. 82 (1978)], from an adverse ruling after trial and verdict [United States v. Wilson, 420 U.S. 332 (1975)], and from a sentence [United States v. DiFrancesco, 449 U.S. 117 (1980)]. One restriction the Double Jeopardy Clause places upon government

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of 7 years to the consecutive 21-year sentence imposed, the trial court found as aggravation that Rumsey planned the robbery for pecuniary gain. Ariz.Rev.Stat.Ann. §§ 13-702. (J.A. 66.)

appeals is a prohibition against appealing from an adverse ruling during trial after a jury has acquitted the defendant. This restriction protects the defendant against multiple trials for the same offense. The acquittal is final and may not be reopened regardless of what errors have been made. In this regard, however, sentences are treated differently from jury verdicts of acquittal.

This Court has never considered the pronouncement of a sentence to be an acquittal of any higher sentence. For instance, this Court has said that a sentence may be increased during the same term of court. Ex Parte Lange, 18 Wall 163 (1874). The Court has upheld sentences after retrial more severe than the original sentences. Chaffin v. Stynchcombe, 412 U.S. 17 (1973); North

Carolina v. Pearce, 395 U.S. 711 (1969); Stroud v. United States, 251 U.S. 15 (1919). The Court has permitted a trial court to correct a sentence by increasing it [Bozza v. United States, 330 U.S. 160 (1947)], and the Court has permitted the government to appeal what the government considers an inadequate sentence. United States v. DiFrancesco, 449 U.S. 117 (1980). Traditionally, sentences have not had the finality of jury verdicts. Only once has the Court recognized an exception to that tradition and that was in Bullington v. Missouri, 451 U.S. 430 (1981). There the Court blurred the traditional distinction between sentences and acquittals. The stated reason for this was that the Missouri procedure that led to Bullington's sentence was so like the procedure that leads to a jury acquittal that, for double jeopardy

purposes, the two could not be distinguished. The Missouri procedure was not like that in any of the Court's previous cases where the imposition of a particular sentence was not regarded as an acquittal. The Missouri procedure was by statutory design and effect a trial on the issue of punishment.

In this case the Arizona Supreme Court compared the Missouri and Arizona death sentencing procedures and felt the similarities were such that Bullington required a finding that Dennis Rumsey's life sentence was as final as a jury verdict and could not be altered. But there are significant differences in the two procedures that do not demand that they be treated alike. And more importantly, the manner in which the factual matters were handled and resolved in Bullington is so different from the

treatment of the factual matter in Rumsey's case that Bullington does not require that the results be the same.

II. Bullington v. Missouri does not come into play in this case.

The significant fact that distinguishes this case from Bullington is that here the trial court did not resolve any factual issue against the state which upon resentencing required further proceedings devoted to factual resolutions. The trial court found, as the state urged, that Rumsey committed the crime for pecuniary gain.[9] But because the court believed that that

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9. Rumsey did not argue at the initial sentencing hearing that the crime had not been committed for pecuniary gain. He argued, as the trial court found, that even if it had been, the pecuniary gain aggravating circumstance found in the death penalty statute applied only to hired killers. (J.A. 37-39.)

aggravating circumstance in the death penalty statute applied only to hired killers, the court refused to apply it in determining Rumsey's sentence for murder. It was this erroneous refusal that the state appealed. Thus, when the Arizona Supreme Court reversed and remanded for resentencing no facts had to be resolved. The only thing left to do was correct the trial court's error.

In Bullington factual issues were resolved against the state at the initial sentencing and a resentencing would have involved retrying those factual disputes.

III. Arizona's death sentencing procedure is different from Missouri's.

In Arizona, once a defendant has been convicted by a jury of first-degree murder, the jury has nothing more to do with the case. Sentence is determined by

the trial court after a hearing during which the court decides if any statutory aggravating circumstances exist, if any mitigating circumstances have been shown, and whether the mitigation is substantial enough to call for leniency. If the court determines that a statutory aggravating circumstance is proved beyond a reasonable doubt and that no mitigation has been shown, the court must impose a death sentence. State v. Gretzler, 135 Ariz. 42, 659 P.2d 1 (1983). If an aggravating circumstance has been proved and mitigation has been shown but it is not substantial enough to call for leniency, the court must impose a death sentence. If the court finds that no aggravating circumstance has been proved, the court must impose a life sentence.

In addition to the absence of a jury as sentencer, the Arizona and Missouri

procedures differ in the following ways:

(1) Closing arguments are provided for by statute in Missouri, not in Arizona.

(2) Instructions are given to the jury in Missouri. There are no instructions in Arizona.

(3) In Missouri the rules of evidence are followed as to both aggravating and mitigating evidence. In Arizona the rules of evidence do not apply to mitigation.

(4) In Missouri the jury must be convinced beyond a reasonable doubt that the aggravating circumstances it finds are sufficient to warrant the death penalty. In Arizona the trial judge is not required to make a separate determination that the death penalty is warranted.

(5) In Missouri even if the jury is convinced that an aggravating

circumstance exists and that it outweighs the mitigation, it may refuse to impose the death sentence. This gives the defense the opportunity to use its forensic skills to convince the jury that regardless of what aggravation and mitigation has been shown, the jurors should allow their compassion alone to spare the defendant's life. This cannot happen in Arizona because when aggravation exists and no mitigation is shown or the mitigation does not outweigh the aggravation, the judge must sentence to death.

Missouri's capital sentencing procedure closely resembles a trial on the issue of guilt. A Missouri jury, in the traditional manner of trials on guilt, determines whether the state has proved its case and when it determines that a life sentence is appropriate it has, in a

real sense, determined that the state has not proved its case for death. Arizona's procedure is not as adversarial or final and in most ways is similar to the procedure outlined in DiFrancesco which this Court distinguished in Bullington from the Missouri procedure.

In a typical Arizona sentencing hearing, the prosecutor begins by listing for the court the evidence he presented at trial which shows one or more of the aggravating circumstances required to impose a death sentence. [This is similar to what the government did in United States v. DiFrancesco, 449 U.S. at 124.] The prosecutor may introduce certified copies of prior convictions to show aggravation [as the government did in United States v. DiFrancesco, 449 U.S. at 124]. The court then calls upon the defense to present its mitigation. The

defense attorney may refer to things that were in evidence at trial. He may, because he does not have to follow the rules of evidence, relate things he has learned about the defendant, his background and his family. He may cite defendant's age. He may argue defendant's relative culpability and the culpability of others, and he may attack the showing of aggravation [as the defense did in United States v. DiFrancesco, 449 U.S. at 124]. Although permitted, there is rarely rebuttal evidence from the state.

Once the state has cited the applicable aggravation evidence and the defense its mitigation, each side may argue how that evidence fits into the categories of aggravation and mitigation defined by the statute and case law. Usually this is done by citing for the trial court

Arizona Supreme Court opinions defining the aggravating factors. In Rumsey's case the prosecutor summarized the law on pecuniary gain and two other aggravating circumstances. Following that, the trial court states what aggravation it finds, what mitigation it finds, and whether the aggravation outweighs the mitigation [in a manner similar to the trial court's findings in United States v. DiFrancesco, 449 U.S. at 124]. If death is imposed, an appeal to the Arizona Supreme Court is automatic. Once the appeal is perfected, the supreme court conducts an independent review of the aggravating and mitigating evidence and comes to its own conclusion on sentence. State v. Gretzler, 135 Ariz. at 54, 659 P.2d at 13 (1983). The supreme court looks at everything anew, determines for itself what is and what is not aggravation and mitigation, and then

does its own weighing, aggravation against mitigation. This review has resulted in the reduction of nine death sentences to life, six in which the supreme court concluded, contrary to the trial judge's finding, that the mitigation was substantial enough to call for leniency,[10] and three in which the supreme court found insufficient evidence to sustain the trial court's finding of aggravation.[11]

Because of this comprehensive review,

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10. State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983); State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 237 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977).

11. State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979); State v. Verdugo, 112 Ariz. 288, 541 P.2d 388 (1975).

the trial court sentencing in Arizona is not the final step. In almost every case to go before the supreme court the defendant has asked the court to upset the trial court's findings and impose a life sentence or he has asked that the case be remanded for resentencing. The trial court hearing is the beginning of a winnowing process where both the aggravation and the mitigation begin to take form.

Although the state at the sentencing hearing may show as aggravation only those things admissible under the rules of evidence, the purpose of that restriction probably is not to make the sentencing proceeding more like a trial, but to require more credibility and reliability of the facts upon which the death sentence may rest. The same thing may be said of the requirement that the

aggravating factors be proved beyond a reasonable doubt. State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980).

Once a death sentence is imposed the defendant is not the only one who can appeal a death sentence in Arizona. The state can appeal a death sentence if it is illegal[12], and the state may appeal a question of law when the defendant is convicted and appeals.[13] Appeals in cases where a death sentence or a life sentence has been imposed go directly to the Supreme Court.[14] The Arizona Supreme Court has not yet determined whether the state can appeal a life sentence where the defendant does not appeal.

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12. Ariz.Rev.Stat.Ann. § 13-4032(6).

13. Ariz.Rev.Stat.Ann. § 13-4032(4).

14. Ariz. Const., art. 6, § 27; Ariz.Rev.Stat.Ann. § 12-120.21.

This death sentencing procedure is no different from the procedure for imposing sentences less than death. In all non-death penalty cases, the trial court is the sentencer. After conviction the trial court holds a presentencing hearing or reviews a presentence report to determine what aggravation and mitigation exists, many of the statutory aggravating and mitigating factors are the same as they are in death cases, at the conclusion of the hearing the trial judge states on the record the aggravation and mitigation he finds, and the trial court weighs aggravation and mitigation to arrive at an appropriate sentence[15]. Arizona has never considered this procedure to be a continuation of the guilt trial and the fact that the state

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15. Ariz.Rev.Stat.Ann. § 13-702.

may appeal if the trial court imposes anything other than the statutory presumptive sentence[16] shows that Arizona does not consider pronouncement of a sentence an acquittal of any higher sentence.

IV. Arizona did prove its case against Rumsey at the sentencing hearing.

If the Arizona procedure were a continuation of the trial at which the state is required to muster its forces for the one chance it gets to prove its case for death, it did prove its case against Rumsey. The state proved that Rumsey robbed and murdered for pecuniary gain and the trial court found that it did, but erroneously refused to apply it to the death sentence. All the state asked for on appeal was that the error be corrected. If one of the basic values of

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16. Ariz.Rev.Stat.Ann. § 13-4032(6).

the Double Jeopardy Clause is to protect against multiple trials for the same offense where the state has once failed to prove its case, that value will not be diminished by allowing the state to correct an erroneous sentence where the state did prove its case. A correction will not allow the state to regroup and try once more to prove its case of death against the defendant because it does not have to; it has already done that.

The effect of allowing such a correction is similar to the effect of allowing the state to appeal an erroneous directed verdict of acquittal by the trial court after a jury has found the defendant guilty. See United States v. Wilson, 420 U.S. 332. Correcting the error the trial court made in entering the directed verdict does not subject the defendant to another trial, and does not

give the state another opportunity to prove its case; it merely reinstates the finding of guilt that has already been made. Correcting the trial judge's error in this case does not give Arizona another opportunity to prove its case; it simply allows a finding already made to be applied correctly.

V. Bullington v. Missouri should be overruled.

This case is a good opportunity for the Court to reassess its holding in Bullington. Bullington is an anomolous decision. In United States v. DiFrancesco, announced just a few months before Bullington, this Court reiterated traditional law that "the imposition of sentence does not operate as an implied acquittal of any greater sentence." DiFrancesco, 449 U.S. at 136, n. 14. Yet in Bullington the Court failed to pay due

deference to that tradition and to long-standing decisions recognizing a fundamental difference between sentencing and determinations of guilt or innocence. Bullington obscures that difference and renders the double jeopardy concept that much more uncertain because the finality of future sentences can only be determined by gauging how similar the procedures that produced them are to a jury trial on guilt.

Moreover, considerations of stare decisis should not deter this Court from overruling Bullington. See United States v. Scott, 437 U.S. at 101. As this Court recognized in Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company, 429 U.S. 363 (1977)[17],

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17. Oregon overruled a case decided three years earlier, Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973).

considerations of stare decisis play a less important role in constitutional issues than they do in cases involving substantive property laws. Therefore, in construing the Double Jeopardy Clause, continuity, certainty and sound policy should overcome stare decisis in the overruling of Ellington.

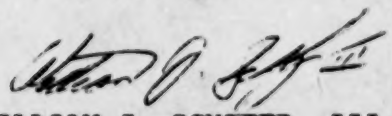
CONCLUSION

The life sentence imposed upon Dennis Rumsey was erroneous. The facts presented by the state at the initial sentencing hearing proved an aggravating circumstance, that the murder was committed for pecuniary gain; but the trial court erroneously interpreted that circumstance to apply to hired killers only and imposed a life sentence. Where the state has proved its case in the trial court, and the life sentence

imposed is the result of legal error, the state should be permitted an appeal to correct that error. The judgment of the Supreme Court of Arizona precluding correction of that error should be reversed.

Respectfully submitted,

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No. 83-226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF ARIZONA,
Petitioner,

v.

DENNIS WAYNE RUMSEY,
Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Does the Arizona capital sentencing procedure resemble a trial, thus rendering a life sentence an implicit acquittal of the death penalty, which would bar a subsequent imposition of the death penalty on double jeopardy grounds?

When all factual issues were resolved against the state at a capital sentencing proceeding which resembled a trial, and when the defendant does not win a retrial, is the state precluded by the Double Jeopardy Clause from conducting a second capital sentencing hearing in an effort to relitigate those facts which were resolved against it at the first hearing?

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No. 83-226

STATE OF ARIZONA,

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v.

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Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Dennis Rumsey was charged by an Information filed December 6, 1979, with Armed Robbery and First Degree Murder.

At trial, one Kimberly Holmes testified that in October, 1979, she and Respondent were hitchhiking to Respondent's parents' home in Las Vegas. They were picked up by the victim, George Koslosky, in New Mexico or Texas. They stopped in Phoenix, where Respondent and the victim went into a store to buy some beer. Upon returning to the automobile, Respondent told his companion that the victim had over three hundred dollars ($300.00), and that he was going to rob the victim. Upon leaving Phoenix, Respondent was driving and the victim

was sleeping in the back. After driving approximately forty-five minutes, Respondent pulled over to the side of the road, and awakened the victim. He ordered the victim at gunpoint to empty his pockets and get into the trunk. The victim refused, and Respondent eventually shot the victim twice and dragged him to the side of the road. (Reporter's Transcript, June 3, 1980, pp. 22-70).

Respondent testified in his own behalf that he had never discussed robbing George Koslosky. Upon leaving Phoenix, he testified, the victim was driving the car, and Respondent passed out in the back seat from consuming alcohol and depressant drugs. Some time later, he awoke to find Kimberly driving the car, shaking and crying. She told him she had shot the victim because he had tried something with her when she had stopped the car to get aspirin from the trunk. Respondent admitted having told his brother in Las Vegas that it was he who shot the man, but explained that he had only done so to prevent Kimberly from being charged. (Reporter's Transcript, June 3, 1980, p. 118-June 4, 1980, p. 72).

On June 6, 1980, Respondent was convicted of Armed Robbery and First Degree Murder. On July 3, 1980, the trial court conducted a sentencing hearing as required by A.R.S. § 13-703. (J.A. 1-52). In its effort to prove aggravating circumstances, the state relied on evidence already presented at trial. Respondent called as a witness the foreman of the trial jury, who testified that the jury had rejected the premeditation theory, and had convicted Respondent based on the felony-murder rule, and that most of the jurors felt a life sentence was appropriate. (J.A. 3-9).

On July 7, 1980, the trial court announced its special verdict, finding that there were no aggravating and no mitigating circumstances. (J.A. 53-58). Specifically, the

trial court found that the offense was not committed as consideration for the receipt or in expectation of the receipt, of anything of pecuniary value. A.R.S. § 13-703(F)(5). (J.A. 54-55). The trial court stated it disagreed with the position the state took at the sentencing hearing, and stated that when § 13-703(F)(5) is read together with § 13-703(F)(4), it is meant to apply to contract-type killings, not to killings during robberies. (J.A. 55).

Because the trial court found that no aggravating circumstances were proven, the court was required to impose a sentence of life imprisonment without parole for twenty-five years. The trial court also imposed a sentence of twenty-one years on the armed robbery charge, to run consecutively to the sentence imposed on the murder. (J.A. 72-73).

Respondent appealed, arguing that the imposition of consecutive sentences was improper; the state cross-appealed, arguing that the trial court erred in ruling on a question of law by finding A.R.S. § 13-703(F)(5) inapplicable to Respondent's case.[1] The consecutive sentences were affirmed by the Arizona Supreme Court. *State* v. *Rumsey*, 130 Ariz. 427, 636 P.2d 1209 (1981). The court further ruled that, based on *State* v. *Clark*, 126 Ariz. 428, 616 P.2d 888, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), which was decided eighteen days after Respondent's sentencing, the trial court had erred in ruling that A.R.S. § 13-703(F)(5) only applied to murder for hire situations. *(Id.)* The sentence of life imprisonment on the murder charge was set aside, and the matter remanded for redetermination of aggravating and

[1] The cross-appeal was taken under A.R.S. § 13-4032(4) which permits the state to appeal from, "A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment."

mitigating circumstances and resentencing on that charge.[2]

On remand, the trial court held another sentencing hearing under A.R.S. § 13-703. (J.A. 75-117). No further evidence was presented, both parties relying on the evidence presented at trial and the first sentencing hearing. Respondent argued that this Court's opinion in *Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), prohibited the trial court from imposing the death penalty after having previously sentenced Respondent to life. (J.A. 99-102). Respondent also argued that the imposition of a sentence of death would violate 17 A.R.S., Rules of Criminal Procedure, rule 26.14, and *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). On February 4, 1982, the trial court announced its finding that the only aggravating circumstance was that the offense was committed for pecuniary gain under A.R.S. § 13-703(F)(5). (J.A. 119-120). The trial court found no mitigating circumstances (J.A. 121-124), and ordered that Respondent suffer the penalty of death as required under A.R.S. § 13-703(E). (J.A. 135).

The death sentence was appealed automatically under 17 A.R.S., Rules of Criminal Procedure, Rule 31.7. A number of issues were raised by Respondent on appeal; however, the Arizona Supreme Court limited its discussion to whether the Arizona capital sentencing procedure is effectively a trial. *State* v. *Rumsey*, 136 Ariz. 166,

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[2] Justice Gordon dissented from the holding in *Clark* on the issue in question on the same reasoning the trial court used herein. The decision in *Rumsey* which set aside the life sentence and remanded for resentencing was essentially a three to two decision. Justice Gordon specially concurred based on his dissent in *Clark*. Chief Justice Struckmeyer dissented on the ground that such a ruling would have a chilling effect on the right to appeal.

655 P.2d 48 (1983). The court found that it is, and that under *Bullington* v. *Missouri*, *supra*, Respondent's original life sentence amounted to an acquittal of the death penalty. *(Id.)* A subsequent sentence of death, the court held, would violate the double jeopardy provisions of the Fifth Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The Double Jeopardy Clause protects a defendant who has been acquitted from reprosecution for the same offense. This applies to implicit acquittals, and applies even though the acquittal may have been erroneously entered. Although government appeals are not totally prohibited, the government may not appeal when a defendant is acquitted, no matter how erroneous the acquittal.

Although this Court has generally declined to apply the Double Jeopardy Clause to the mere imposition of a sentence less than the maximum, the Court has afforded such protection when the sentencer has the choice of life or death, and that choice depends upon the result of a fact-finding proceeding which resembles a trial on guilt or innocence. *Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). That situation exists in the present case.

The present case is not distinguishable from *Bullington* either on the basis that the resolution of facts at the sentencing hearing was different, or on the basis that the procedures used were significantly different. Contrary to Petitioner's position, the facts resolved at the sentencing hearing were resolved against the state, as they were in *Bullington*. In fact, because of the precision of the special

verdict in Arizona, and because in Arizona the death penalty is mandatory if the state proves its case, it is even more clear in the present case than it was in *Bullington* that the factual issues were resolved against the state.

The major factors which make the Missouri procedure resemble a trial are: (1) The finder-of-fact/sentencer has the choice between two alternatives rather than a broad range of choices; (2) There are specific standards which govern that choice; and (3) The burden is upon the state to prove certain facts beyond a reasonable doubt in its quest for the harsher sentence. The Arizona procedure includes those major factors.

None of the distinctions between the Arizona and Missouri death penalty procedures are significant. Those differences which do exist do not make the Arizona procedure less like a trial than the Missouri procedure. In fact, some of those distinctions actually make the Arizona procedure more like a trial.

The sentencing procedure in the present case is distinguishable in every significant respect from *United States* v. *DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), in which this Court allowed a government appeal from a sentence. Any similarities betwen this case and *DiFrancesco* are also shared with *Bullington*, and do not diminish the resemblance of the procedure herein to a trial. Furthermore, the factual issues in the sentencing hearing in *DiFrancesco* were resolved against the defendant, thus he was found to be subject to a harsher penalty. In the present case, the opposite was true.

If a sentence of life is imposed at the conclusion of the Arizona sentencing procedure, that special verdict is final. Only if the death penalty is imposed is there an auto-

matic appeal and review of the sentence. Contrary to Petitioner's claim, the Arizona death penalty sentencing procedure does not resemble the sentencing procedure used in non-capital cases in any significant way.

The State of Arizona did not prove its case at the original sentencing hearing. There was no verdict in favor of the state which could be reinstated after the state's cross-appeal. Not only did the court have to conduct a second hearing to give the state the opportunity to prove the aggravating circumstance which was disputed on appeal, but the state also took that opportunity to try once again to prove two other aggravating circumstances which the court had found at the first hearing did not exist.

Bullington v. *Missouri*, *supra*, should not be overruled because it is not in fact at odds with previous double jeopardy law. Although previously this Court has declined to extend double jeopardy protection to the imposition of sentence, *Bullington* and the present case do not involve the mere imposition of sentence. They involve a fact-finding proceeding which resembles a trial, and after which the death penalty may not be imposed unless the state has proven certain facts beyond a reasonable doubt. This stands in stark contrast to the usual sentencing decision, which is essentially unguided regarding precisely which sentence, within a range of sentence, must be imposed on a particular defendant in a particular case.

The evils against which the Double Jeopardy Clause is designed to protect exist at a retrial of this sentencing issue just as they would at any retrial. There is the risk that ultimately, with repeated attempts by the state, an individual who is not guilty of those facts necessary for the death penalty may be found guilty of them. Certainly,

a retrial of the capital sentencing procedure involves the same embarrassment, expense, ordeal, anxiety and insecurity as any retrial would.

In the present case, the reasons for the application of the Double Jeopardy Clause are even stronger than those in *Bullington*, and thus it presents an inappropriate vehicle for reconsidering that case.

ARGUMENT

After Respondent's conviction for murder, first degree, a mandatory sentencing hearing was held. That hearing resembled a trial. Four days later, the court issued its special verdict, which resolved factual issues against the state, acquitting Respondent of those things required to be proven before the death penalty may be imposed. The issue presented is whether it is a violation of the Double Jeopardy Clause for the state to subject Respondent to a second prosecution of the death penalty sentencing hearing in an effort to prove those factual issues which were resolved against it at the first hearing.

POINT I

The Double Jeopardy Clause Is Applicable To The Imposition Of Sentence When The Procedure Used To Arrive At That Sentence Resembles A Trial

This Court has on numerous occasions summarized the history of the Double Jeopardy Clause, and its various applications. See *United States* v. *DiFrancesco*, 449 U.S. 117, 126-131, 101 S.Ct. 426, 431-434, 66 L.Ed.2d 328 (1980); *United States* v. *Scott*, 437 U.S. 82, 87-92, 98 S.Ct. 2187, 2192-2194, 57 L.Ed.2d 65 (1978). The Double Jeopardy Clause protects a defendant who has been acquitted from being prosecuted again for the same offense. *United States* v. *Ball*, 163 U.S. 662, 16 S.Ct 1192, 41

L.Ed. 300 (1896). If a defendant is convicted, but has his conviction overturned on appeal or in other post-conviction proceedings, the Double Jeopardy Clause does not forbid a retrial, unless the reversal was won because the evidence was insufficient. *Id.*; *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). When a defendant is convicted of a lesser included offense of the offense charged, there is an implicit acquittal of the greater offense, and reversal of the conviction would allow a retrial only as to the lesser offense. *Green* v. *United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). A necessary corollary of the finality of an acquittal established in *Ball*, *supra*, is that an acquittal, even though erroneously entered, may not be reviewed on appeal. *Arizona* v. *Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *Fong Foo* v. *United States*, 369 U.S. 141, 82 S.Ct. 67, 7 L.Ed.2d 629 (1962).

Petitioner points out that appeals by the government are not altogether prohibited by the Double Jeopardy Clause, citing several cases which illustrate circumstances under which such appeals are permitted. As will appear throughout the following arguments, the cases cited by Petitioner are all distinguishable from the present case. In *United States* v. *Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), the government sought to appeal from a dismissal which was not based upon the merits of the case, and which occurred prior to the submission of the matter to the finder of fact for a verdict. In *United States* v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), the government was permitted to appeal from a judgment of acquittal entered after the jury had returned a verdict of guilty. The government is also permitted to appeal from a sentence when the procedure used to arrive at that sentence does not bear the signifi-

cant hallmarks of a trial, and where such an appeal is specifically provided for in the statutes which authorized the penalty. *United States* v. *DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). However, Petitioner concedes, as he must, that the government is precluded from appealing when a defendant is acquitted, regardless of the errors which may have been committed up to that point.

Although the precise issue presented herein was first presented to this Court only recently in *Bullington* v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the application to sentencing of the protections of the Double Jeopardy Clause is not a novel idea. It was stated in *Ex parte Lange*, 18 Wall., 163, 21 L.Ed. 872 (1874), "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." 18 Wall. at 169, 21 L.Ed. 872.[3] Contrary to what is implied by Petitioner, *Lange* does not stand for the proposition that a sentence may be increased during the same term of court. It has been said of *Lange:*

> As is borne out by subsequent cases, the Double Jeopardy Clause as interpreted in *Ex parte Lange* prevents a sentencing court from increasing a de-

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[3] Nor is the application of the Double Jeopardy Clause to sentencing an idea that is novel to the Arizona Supreme Court. In *State* v. *Watson*, 120 Ariz. 441, 586 P.2d 1253 (1978), the defendant, whose original death sentence was set aside on appeal, claimed that the imposition of the death penalty at his resentencing constituted double jeopardy. The Arizona Supreme Court disagreed, but stated that had the defendant begun to serve a life term in place of the original death sentence, double jeopardy considerations would have prevented the later imposition of the death penalty. 120 Ariz. at 453, 586 P.2d at 1265.

> fendant's sentence for any particular statutory offense, even though the second sentence is within the limits set by the legislature. [Citations omitted.]
>
> *Whalen* v. *United States*, 445 U.S. 684, 703, 100 S.Ct. 1432, 1443, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting).

But see *United States* v. *DiFrancesco*, *supra*, at 138-139, 101 S.Ct. at 438.

As Petitioner points out, this Court has on a number of occasions declined to apply double jeopardy protection to a sentence which is less than the maximum. *United States* v. *DiFrancesco*, *supra*; *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973); *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Stroud* v. *United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919). However, each of those cases is distinguishable from the present case because the sentencing procedure used herein was significantly different from those employed in the above referenced cases. See *Bullington* v. *Missouri*, *supra*, at 438-440, 101 S.Ct. at 1857-1859.[4] In *Bullington*, this Court recognized it was dealing with a sentencing procedure which was very different from those previously considered by the Court. The capital sentencing procedure in *Bullington*, the Court held, bears the significant hallmarks of a trial on the question of guilt or innocence, thus a sentence—or verdict—of life imprisonment is an acquittal as to the death penalty, and must be accorded the same finality as any other acquittal.

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[4] In addition, in *Chaffin*, *Pearce* and *Stroud*, the defedants each won a retrial either on appeal or in other post-conviction proceedings. Respondent did not win a retrial, nor did he win anything at all on appeal. Thus, the present case does not even call into play the general rule that a harsher sentence may be imposed on retrial.

In the case presently before this Court, the Arizona Supreme Court, in its unanimous opinion, stated:

> In Arizona, as in Missouri, a special procedure is applicable to capital cases. The resemblance of this procedure to a trial is apparent on examination of A.R.S. § 13-703.
>
> *State* v. *Rumsey*, 136 Ariz. at 171, 665 P.2d at 53. (Page A-13 of Appendix to Petition).

The Arizona Supreme Court specifically held that the Arizona capital sentencing procedure before the trial court "resembles a trial on the issue of life or death." 136 Ariz. at 173, 665 P.2d at 55 (page A-22 of Appendix to Petition).

Although it was essentially the Arizona Supreme Court's own analysis which led to that conclusion, the Court did make comparisons to *Bullington* v. *Missouri*, *supra*, and addressed the differences in the procedures pointed out by the state before that court. The Arizona court concluded that there were no significant differences between the two procedures. 136 Ariz. at 174, 665 P.2d at 56, (page A-25 of Appendix to Petition).

POINT II

The Resolution Of Factual Issues In The Present Case Does Not Distinguish It From Bullington v. Missouri

Petitioner states that the present case is distinguishable from *Bullington* because the trial court herein did not resolve factual issues against the state. Petitioner further claims that the trial court found that the murder was committed for pecuniary gain, but refused to apply that aggravating circumstance in determining sentence. Respondent submits that Petitioner's claims in this regard are unsupported, and are in fact contradicted by the record. The disputed aggravat-

ing circumstance concerns whether or not, "The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." A.R.S. § 13-703(F)(5). In the initial special verdict, the trial court specifically found:

> 5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> (J.A. 54).

The court gratuitously added that it disagreed with the state's interpretation of A.R.S. § 13-703(F)(5), stating that the aggravating circumstance describes only murders for hire.[5] The trial court imposed a sentence of life imprisonment, without parole for twenty-five years, at the initial sentencing. (J.A. 64).[6] Regardless of whether the factual issue to be resolved at the sentencing hearing is considered to be the existence or non-existence of aggravating circumstances, or whether the sole factual issue is the imposition of a life sentence versus the death penalty, it is clear that in either event, the factual issue

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[5] The sentencing judge is not alone in his interpretation of A.R.S. § 13-703(F)(5). Two members of the five member Arizona Supreme Court have since agreed with the precise reasoning expressed by the sentencing judge. *State* v. *Blazak*, 131 Ariz. 598, 643 P.2d 694, 701 (1982) (Gordon, J., specially concurring; Cameron, J., explanatory note); *State* v. *Clark*, 126 Ariz. 428, 616 P.2d 888, 897 (1980) (Gordon, J., specially concurring).

[6] Petitioner also implies that in order to enhance Respondent's robbery sentence, the trial court found that the robbery was committed "for pecuniary gain." (Brief for Petitioner, p. 14, footnote 8). In fact, the trail court did not mention the term "pecuniary gain," and did not mention the statute number, A.R.S. § 13-702(D)(6), which deals with pecuniary gain, in enhancing that sentence. (J.A. 66). Instead, the court found the aggravating circumstances for the robbery under A.R.S. § 13-702(D)(9), which allows the court to consider anything it deems appropriate to the ends of justice. *(Id.)*

was resolved against the state at the initial sentencing proceeding.

The situation herein is not unlike that which might occur in a trial to the court on the issue of guilt or innocence, where the trial court, at the close of the evidence, enters a verdict of acquittal, and then states that he believes the statute was intended to cover a different sort of factual situation. The state would be prohibited by the Double Jeopardy Clause from appealing from that acquittal, even though the state believed that their supreme court might later disagree with the trial judge's application of the statute.

Petitioner states that in *Bullington*, factual issues were resolved against the state at the initial sentencing. In fact, because *Bullington* involved only a general verdict of life, without reference to the existence or nonexistence of aggravating circumstances, and because the jury in Missouri is permitted to choose life imprisonment even though the state has fully proved its case, there is no way of knowing whether any underlying factual issues were in fact resolved against the state in *Bullington*. *Bullington* v. *Missouri*, 451 U.S. at 452, 101 S.Ct. at 1865 (footnote 4) (Powell, J., dissenting). Thus, if there is any distinction between *Bullington* and the present case regarding factual resolutions, it operates in favor of finding even greater reasons to apply the Double Jeopardy Clause in the present case than existed in *Bullington*.

POINT III

There Are No Differences Between The Arizona And Missouri Death Sentencing Procedures Which Are Significant To The Issue Presented Herin

This Court stated in *Bullington* v. *Missouri:*

> The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner

> Bullington at his first trial . . . differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts.
>
> 451 U.S. at 438, 101 S.Ct. at 1858.

Thus, the Missouri capital sentencing procedure resembles a trial because it includes three essential components: (1) The finder-of-fact/sentencer has the ultimate choice between only two alternatives, rather than a wide range of choices; (2) Specific standards guide the making of that choice; and (3) The burden is upon the state to prove certain facts beyond a reasonable doubt in its quest for the harsher result.

In all relevant respects, the Arizona capital sentencing procedure closely resembles that of Missouri.[7] The Arizona capital sentencing procedure allows a choice between only two alternatives.[8] The court does not have unbounded discretion to select from a wide range of possible punishments. At the sentencing hearing required by Arizona law, the court must apply certain standards in making the choice between life and death.[9] The prosecution

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[7] A.R.S. § 13-703.

[8] A.R.S. § 13-703(A).

[9] A.R.S. § 13-703(E), (F) and (G).

has the burden, at that sentencing hearing, of establishing certain facts (aggravating circumstances) beyond a reasonable doubt before the death penalty may be imposed. *State* v. *Jordan*, 126 Ariz. 283, 614 P.2d 825, 828 (1980). Furthermore, the admissibility of evidence regarding those facts which the prosecution must prove is governed by the same rules which govern the admission of evidence at trial.[10] The trial court in Arizona is even required to return a "special verdict" setting forth its findings as to aggravating and mitigating circumstances.[11]

Petitioner points out a number of differences between the Arizona and Missouri sentencing procedures. Respondent submits that those differences are not significant to the issue presented herein. Several of those differences were specifically discussed by the Arizona Supreme Court, and were not considered by that court to be sufficient to preclude a finding that the Arizona procedure resembles a trial. Petitioner first discusses the fact that the Arizona sentencing hearing is conducted before the judge rather than the jury.[12] Were this difference significant to the application of the Double Jeopardy Clause, then it would logically follow that trials to the court on the issue of guilt or innocence would, as far as Double Jeopardy considerations are concerned, be treated differently than trials to a jury. This, of course, is not the law.

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[10] A.R.S. § 13-703(C).

[11] A.R.S. § 13-703(D).

[12] It is noteworthy that the law in effect at the time of Respondent's sentencing required the sentencing hearing to be conducted by the judge who presided over the trial. A.R.S. § 13-703(B). If that judge were unable, for whatever reason, to preside, no other judge could replace him. *State* v. *Leslie*, 136 Ariz. 463, 666 P.2d 1072 (1983); *State* v. *McDaniel*, 127 Ariz. 13, 617 P.2d 1129 (1980).

Whether a defendant waives a trial by jury, or is simply not entitled to one by law, he is still entitled to the protections of the Double Jeopardy Clause. Both *United States* v. *DiFrancesco*, *supra*, and *North Carolina* v. *Pearce*, *supra*, involved sentencings by the judge rather than the jury. However, in distinguishing those cases from the situation presented in *Bullington*, this Court never commented on the lack of jury participation in the sentencing as a significant distinguishing characteristic. 451 U.S., at 439-441, 101 S.Ct., at 1858-1859.

Petitioner states that closing arguments are provided for by statute in Missouri, but not in Arizona. In fact, the Arizona statute provides, in pertinent part:

> The prosecution and defendant . . . shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section.
>
> A.R.S. § 13-703(C).

Petitioner points out that instructions are given to the jury in Missouri, but there are no instructions in Arizona. This, of course, is true of any trial to the court.

Petitioner notes that in Missouri, the rules of evidence apply to both aggravating and mitigating evidence, but that in Arizona they apply only to evidence regarding aggravating circumstances. The Arizona Supreme Court held that this was not a significant distinction. 136 Ariz. at 172, 665 P.2d at 54 (pages A-16 to A-17, Appendix to Petition). Respondent submits that what is important in this regard is that the information concerning aggravating circumstances—without proof of which the death penalty may not be imposed—is subject to the rules of evidence, implying that the risk of error is to be borne by the state, not the defendant.

Further, Petitioner observes that the Missouri jury must, once it finds aggravating circumstances, be convinced beyond a reasonable doubt that these circumstances warrant the death penalty, while the Arizona judge need not be so convinced. Respondent submits that this distinction merely reflects the Arizona legislature's determination that any aggravating circumstance warrants the death penalty, if there are not sufficiently substantial mitigating circumstances. This is similar to the legislature's power to determine which elements are required for conviction of a substantive crime, and in no way diminishes the resemblance of Arizona's sentencing procedure to a trial.

Finally, Petitioner focuses on the fact that even when a Missouri jury determines that the state has prevailed in all respects regarding the factual issues to be determined, the jury may still refuse to impose the death penalty. Petitioner correctly states that in Arizona, the death penalty is mandatory when the state proves any aggravating circumstance, and there are no sufficiently substantial mitigating circumstances. This clearly makes the Arizona procedure more closely resemble a trial than does the Missouri procedure. *Bullington* v. *Missouri*, 451 U.S. at 452, 101 S.Ct. at 1865 (footnote 4) (Powell, J., dissenting). Never in a trial on the issue of guilt or innocence is a jury instructed that even though they find the state has proven its case, they may nonetheless acquit the defendant.

Petitioner goes to great lengths to make it appear that the Arizona capital sentencing procedure resembles the procedure used in *United States* v. *DiFrancesco*, *supra*, rather than the one used in *Bullington* v. *Missouri*, *supra*. (Brief for Petitioner, pp. 24-26). In fact, Petitioner's contention does not withstand close scrutiny.

Petitioner discusses the chronology of the Arizona procedure, making comparisons to *DiFrancesco*. Petitioner states that a "typical" Arizona capital sentencing hearing begins with the prosecutor listing the evidence from the trial on guilt or innocence, which the prosecutor contends shows aggravating circumstances, and Petitioner likens that procedure to *DiFrancesco*. Assuming that a "typical" Arizona sentencing hearing begins in that way, there is no doubt that the same thing occurred in the Missouri hearing in *Bullington*. (Joint Appendix in *Bullington* v. *Missouri*, p. 61). One of the allegations against *Bullington* was that, "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." 451 U.S., at 435, 101 S.Ct., at 1856. Such an allegation could not be proved without reference to the evidence at trial.

Petitioner argues that another similarity between Arizona's procedure and that in *DiFrancesco* is that certified copies of prior convictions may be introduced by the state.[13] Again, this is also true of the Missouri procedure. 451 U.S., at 433, 101 S.Ct., at 1855 (footnote 4).

Although, as Petitioner states, a defendant in Arizona may attack the showing of aggravation, as the defense did in *DiFrancesco*, it is again difficult to imagine how this is different from the Missouri procedure. The defense in *Bullington* no doubt did its best to attack the showing of aggravation in that case.

The *DiFrancesco* case was distinguished by this Court in *Bullington* v. *Missouri*, *supra*, on several grounds, all of which apply equally to the present case: The procedure at issue in *DiFrancesco* specifically provides for appellate review of a sentence on the record of the sentencing court;

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[13] This was not done in Respondent's case.

the judge in *DiFrancesco* had a broad choice for sentencing, rather than the life or death alternative presented in *Bullington* and herein; and, the prosecution in *DiFrancesco* had the burden at the sentencing hearing of proving an additional fact only by a preponderance of the evidence, in contrast to the reasonable doubt standard used in *Bullington* and herein. 451 U.S., at 440-441, 101 S.Ct. at 1859.

Respondent notes a further factual distinction between the present case and *United States* v. *DiFrancesco, supra*, which appears to be of some significance. In *DiFrancesco*, the factual finding made by the trial court at the sentencing hearing was made in the state's favor, not the defendant's. "The District Court made findings of fact and ruled that respondent was a dangerous special offender within the meaning of the statute." 449 U.S., at 124, 101 S.Ct., at 430. Thus, *Difrancesco* was subject to the enhanced range of punishment provided for, and the statutory appeal by the state from the sentence imposed. In contrast, the factual findings of the trial court in the present case were in Respondent's favor. The trial court found that the state had not proved any facts which subjected Respondent to enhanced punishment. This factor seems to have had some bearing on the decision in *DiFrancesco*, for this Court offered the following hypothetical in explanation of the holding therein:

> Congress might have provided that a defendant *found to be a dangerous special offender* was to receive a specified mandatory term, but that the trial court then could recommend a lesser sentence to the court of appeals, which would be free to accept the recommendation or to reject it. That scheme would offer no conceivable base for a double jeopardy objection. . . . No double jeopardy policy is advanced by approving one of these procedures and declaring the other unconstitutional.

449 U.S., at 142, 101 S.Ct., at 440 [Emphasis added.]

Respondent was not, at the initial sentencing hearing, "found to be" a person subject to the death penalty. Thus, a distinction not pointed out in *Bullington* becomes clear: In *DiFrancesco*, there was, in essence, a verdict of guilty as to the dangerous special offender allegation, and the state merely appealed from the sentence imposed after that verdict; in the present case there was a verdict of acquittal as to those facts which would allow imposition of the death penalty, and the state cross-appealed from that acquittal, not from the imposition of sentence.

Petitioner also goes to great lengths to make it appear that the Arizona sentencing procedure before the trial court is not as final as in *Bullington* v. *Missouri*, *supra*. Again, under close examination, Petitioner's argument does not hold up. Petitioner paints a picture of the Arizona death penalty appellate process which is designed to support the characterization of Arizona's capital sentencing hearing before the trial court as merely, "the beginning of a winnowing process where both the aggravation and the mitigation begin to take form." (Brief for Petitioner, p. 28). Such is not the case.

As Petitioner correctly notes, all cases in which the death penalty is imposed are automatically appealed to the Arizona Supreme Court.[14] Two extremely important facts which must not be forgotten, however, are that no appeal is required if a life sentence is imposed, and that the state may not appeal unless the defendant appeals. *State* v. *Rumsey*, 136 Ariz. at 173, 665 P.2d at 55 (footnote 10). The death penalty appeal process applies only to

[14] 17 A.R.S., Rules of Criminal Procedure, rule 31.2(6). Since the appeal from a death penalty is automatic, Petitioner's claim, at p. 29 of his brief, that the state can appeal a death sentence, is irrelevant.

death penalties. Petitioner seems to lose sight of this important fact early in his discussion of Arizona's death penalty appeal process. As Petitioner points out, the Arizona Supreme Court conducts an independent review of the aggravating and mitigating evidence, but only in death penalty cases. "This review is conducted in order to determine whether the death penalty, when imposed by the trial court, should be reduced to life." *State* v. *Rumsey*, 136 Ariz. at 174, 665 P.2d at 56. The Arizona Supreme Court does look at everything anew, but again, only on appeals from the death penalty. The Arizona Supreme Court has "never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty." *State* v. *Rumsey*, 136 Ariz. at 173, 665 P.2d at 55 (footnote omitted). Petitioner's statement that, "Because of this comprehensive review, the trial court sentencing in Arizona is not the final step" (Brief for Petitioner, pp. 27-28), clearly applies only to those cases in which the death penalty is imposed, not those in which the defendant receives life imprisonment, as Respondent did at his original sentencing.

Petitioner makes the claim that Arizona's death sentencing procedure is no different from the procedures for imposing other penalties in Arizona. (Brief for Petitioner, p. 30). This claim is contradicted by the facts. The two sentencing procedures are described in separate statutes.[15] The non-capital sentencing procedure differs in almost every significant way from the death penalty procedure: Although in a non-capital sentencing, certain aggravating factors are described which must be found in order for the court to exceed the "presumptive" sentence, those factors can include anything, "the court may deem

[15] A.R.S. §§ 13-702 and 13-703.

appropriate."[16] No notice by the state of the aggravating circumstances it intends to prove is required, as it is in death penalty cases. *State* v. *Ortiz*, 131 Ariz. 195, 207, 639 P.2d 1020, 1032 (1981). Unlike death penalty cases, no hearing is required at which the state undertakes the burden of proving anything in order to obtain a harsher sentence. As with most sentencings, the court in a non-capital case has a broad range of punishment from which to select. Aggravating factors at a non-capital sentencing need not be found beyond a reasonable doubt.

Since the Arizona death sentencing procedure differs so significantly from the non-capital procedure, it is irrelevant that Arizona does not consider a sentence imposed under the non-capital procedure to be an acquittal of a higher sentence. It is also irrelevant that the state may appeal from a sentence other than the statutory presumptive sentence, because that right to appeal does not apply to first degree murder cases.[17]

The Arizona death sentencing procedure resembles the procedure used in *Bullington* v. *Missouri*, *supra*, in every significant way. In some respects, the Arizona procedure even more closely resembles a trial than Missouri's. Thus, the Arizona Supreme Court was correct, after finding that the Arizona sentencing procedure resembles a trial, to apply the holding of *Bullington*, and preclude the increase of Respondent's original life sentence to death.

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[16] A.R.S. § 13-702(D).

[17] A.R.S. §§ 13-4032(6), 13-604, 13-701. It should also be noted that, contrary to Petitioner's statement at page 13 of his brief, the state does not have the right to appeal a sentence that is too lenient. The state may only appeal from a sentence other than the presumptive. The state may not appeal from a presumptive sentence, even if it is "too lenient."

POINT IV

The State Of Arizona Did Not Prove Its Case At The Original Sentencing Hearing.

As discussed above in Point II, the trial court did not make any factual findings in favor of the state in at the original sentencing proceeding. All of the findings, both in the trial court's special verdict, and in the imposition of a life sentence, were in favor of Respondent. Thus, unlike *United States* v. *Wilson*, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975), there is no finding of guilt which may be reinstated.

Contrary to Petitioner's contention, in the present case the state was allowed to regroup and have another opportunity to prove its case at the second sentencing hearing. A completely new sentencing hearing was conducted and a new and altered special verdict was issued. (J.A. 75-124). At the new sentencing hearing, the state attempted once again to prove two aggravating circumstances, in addition to the "pecuniary gain" circumstance, which were clearly resolved against the state at the first proceeding. (J.A. 86-91). That is precisely the sort of occurrence against which the Double Jeopardy Clause was designed to protect.

POINT V

Bullington v. Missouri Should Not Be Overruled.

In *Bullington* v. *Missouri*, *supra*, this Court made a very clear distinction between the Missouri capital sentencing procedure and the sentencing procedures used in those cases in which the Court had previously declined to apply the Double Jeopardy Clause to the imposition of a sentence less than the maximum. The Court then declined to extend the reasoning of *Stroud* v. *United States*, *supra*, "to this very different situation."

451 U.S., at 446, 101 S.Ct., at 1862. *Bullington* does not, as Petitioner contends, obscure the difference between trials and sentencings. Rather, *Bullington* explains that the Missouri death penalty sentencing procedure is not simply the imposition of a sentence, but instead is a fact-finding procedure which amounts to a trial, at which the defendant was acquitted. As with any trial, an acquittal at that proceeding is made final by the provisions of the Double Jeopardy Clause. Although Respondent would agree that the mere *imposition* of sentence does not operate as an implied acquittal of any greater sentence, *Bullington* and the present case did not involve the mere imposition of sentence, but rather, as described above, involved a fact-finding trial at which there was an explicit acquittal of the death penalty.

Unlike most sentencings, the death penalty sentencing procedure in *Bullington* is designed to determine specific facts. The sentencing jury in *Bullington* was not allowed to simply use their unfettered discretion to impose whatever punishment they felt appropriate, selected from a broad range of penalties. If the necessary facts were proven, the defendant could receive the death penalty; if they were not proven, he could not receive it. As the dissent in *Bullington* points out, "Missouri has decided that death is an appropriate punishment for one whose guilt of murder *with aggravating circumstances* is made clear through special procedures." 451 U.S., at 453, 101 S.Ct., at 1865 (Powell, J., dissenting) (emphasis added). In Missouri, as in Arizona, guilt of first degree murder alone is not punishable by the death penalty.

The reasons for applying the Double Jeopardy Clause to trials on guilt or innocence apply equally to sentencing trials such as Missouri's and Arizona's. A retrial of a defendant on the death penalty proceeding certainly "enhance[s] the possibility that even though innocent, he

may be found guilty." *Green* v. *United States*, *supra*, at 188, 78 S.Ct., at 224. Unlike an ordinary sentencing decision, it cannot be said of the sentencing procedures at issue here that one sentencer's decision is as correct as the next. For instance, the aggravating circumstances which must be proven by the state in order to subject a defendant to the death penalty are objective facts which are either true or are not true.[18] Retrial of the death penalty proceeding increases the likelihood of an erroneous factual finding which will subject a defendant to the death penalty. A defendant should not be subjected to this risk. Even Petitioner concedes that the purpose of using the reasonable doubt standard herein is to require more credibility and reliability of the facts upon which the death sentence may rest. (Brief for Petitioner, pp. 28-29). As this Court stated, when the reasonable doubt standard is employed, it is ". . . 'designed to exclude as nearly as possible the likelihood of an erroneous judgment. . . . [O]ur society imposes almost the entire risk of error upon itself.' *Addison* v. *Texas*, 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979)." *Bullington* v. *Missouri*, 451 U.S., at 441, 101 S.Ct., at 1859.

The Double Jeopardy Clause also protects a defendant against the embarassment, expense, ordeal, anxiety and insecurity which accompany repeated attempts to convict him of a particular offense. *Green* v. *United States*, *supra*, at 187-188, 78 S.Ct., at 223-224. This also applies equally to one acquitted of the death penalty in proceedings such as those at issue here. Hypothetically, assume a defendant is charged separately with Murder, first degree, and Shoplifting, a misdemeanor. He is convicted of the murder, but in a sentencing proceeding resembling a trial, is acquitted of those things required for the death

[18] Mo. Rev. Stat. § 565.012.2; A.R.S. § 13-703(F).

penalty. He is subsequently acquitted of the shoplifting charge. It hardly seems appropriate that the Double Jeopardy Clause would protect him from the embarrassment, expense, ordeal, anxiety and insecurity which would accompany a retrial of the Shoplifting charge, but not from those same evils which accompany a retrial on the factual issue of whether he can receive the death penalty. There can be no doubt that those evils would be present to a much greater degree in the latter situation.

The present case would be a most inappropriate one in which to overrule *Bullington* in any event, as the reasons for applying the Double Jeopardy Clause herein are even stronger than those in *Bullington*. The present case does not involve a retrial as *Bullington* did, therefore the "harsher sentence on retrial" rule of *Chaffin*, *Pearce*, and *Stroud*, does not apply here. Further, unlike the procedure in *Bullington*, the Arizona verdict discloses the court's factual findings even if a sentence of life is imposed, so it is more easily said here that the state failed to prove its case. Finally, the Arizona procedure does not permit the sentencer to be lenient and impose life even though the state has proven its case. All of these factors provide even more reason to apply the Double Jeopardy Clause to the present case than existed in *Bullington*.

The *Bullington* decision should not be overruled, and certainly not in this case. *Bullington* is not at odds with previous Double Jeopardy law, it simply recognizes that the reasoning of those cases which declined to afford Double Jeopardy Clause protection to sentencings does not apply when the sentence is determined through a fact-finding procedure which amounts to a trial.

CONCLUSION

The capital sentencing proceeding herein, like that in *Bullington*, resembled a trial on the issue of guilt or innocence. All factual issues at that hearing were resolved, by verdict, against the state. Respondent's acquittal of the death penalty was final under the Double Jeopardy Clause. The Arizona Supreme Court was therefore correct in setting aside his death penalty and reducing it to the original sentence of life.

Respectfully submitted,

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APPENDIX A

ARIZONA REVISED STATUTES

§ 13-703 Sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years

A. A person guilty of first degree murder as defined in § 13-1105 shall suffer death or imprisonment in the custody of the department of corrections for life, without possibility of parole until the completion of the service of twenty-five calendar years, as determined and in accordance with the procedures provided in subsections B through G of this section.

B. When a defendant is found guilty of or pleads guilty to first degree murder as defined in § 13-1105, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances included in subsection F an G of this section, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.

C. In the sentencing hearing the court shall disclose to the defendant or defendant's counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. And presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances included in subsection F or G of this section. Any information relevant to any mitigating circumstances included in subsection G of this section may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials;

but the admissibility of information relevant to any of the aggravating circumstances set forth in subsection F of this section shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances included in subsections F and G of this section. The burden of establishing the existence of any of the circumstances set forth in subsecion F of this section is on the prosecution. The burden of establishing the existence of the circumstances included in subsection G of this section is on the defendant.

D. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection F of this section and as to the existence of any of the circumstances included in subsection G of this section.

E. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances included in subsections F of this section and G of this section and shall imposed a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and that there are no mitigating circumstances sufficiently substantial to call for leniency.

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

G. Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the offense, including but not limited to the following:

1. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. The defendant was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. The defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

5. The defendant's age.

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No. 83-226

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF ARIZONA,
Petitioner,

v.

DENNIS WAYNE RUMSEY,
Respondent

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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No. 83-226

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

v.

DENNIS WAYNE RUMSEY,

Respondent.

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

STATEMENT OF THE INTEREST OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

1. The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation formed to assist black citizens in securing their constitutional rights by the prosecution of lawsuits.

2. Since 1967, the Legal Defense Fund has provided representation and advice in capital cases nationwide, regardless of the defendant's race, because of our conviction that the death penalty is customarily applied in a discriminatory manner, and this discrimination is rooted in the very nature of the death penalty.

3. Legal Defense Fund attorneys appeared as amicus curiae on behalf of the class plaintiffs in Knapp v. Cardwell, 667 F.2d 1253 (9th Cir), cert. denied 103 S.Ct. 473 (1982), and presently represent individual death-sentenced prisoners in Arizona, and assist other lawyers representing condemned men throughout the state.

4. Legal Defense Fund attorneys also represent individuals in other states whose cases may be affected by the

decision in this case. These include capital defendants who have appealed life sentences, relying on this Court's decision in Bullington v. Missouri, 451 U.S. 430 (1981), and persons who have been sentenced to death under statutes which share features of Arizona's law which we believe are unconstitutional, and may be implicated by the decision here.

5. Because the Court's decision in this case may speak to constitutional issues upon which the lives of these Legal Defense Fund clients depend--and because their situation differs from that of the respondent here--we seek to be heard on their behalf.

6. Consent has been given by petitioner and respondent for the filing of this Brief amicus curiae, by letters which have been lodged with the Clerk.

OPINIONS BELOW

The two Arizona Supreme Court opinions in this case are both reported. State v. Rumsey (I), 130 Ariz. 427, 636 P.2d 1209 (1981); State v. Rumsey (II), 136 Ariz. 175, 665 P.2d 48 (1983). They are also set out in full as appendices to the Petition for Certiorari in this case. For the Court's convenience, they are referenced both places throughout this Brief.

STATEMENT OF THE CASE

The petitioner in this case has skewed the facts to support its position, to an extraordinary extent. We do not mean to usurp the respondent's function and correct all the petitioner's errors; but we are compelled to alert the Court to three crucial aspects of the proceedings below which have not been fairly represented to it, and which bear directly on the issues presented in this case.

A. The First Sentencing Verdict.

The trial court's first special verdict reached an explicit finding that "no aggravating circumstances exist" in this case. J.A. 57. The petitioner says "the trial court decided that ... although the murder-robbery was committed for pecuniary gain that statutory circumstance was not applicable to Rumsey ...." Pet. Br. 4-5.

That is grossly misleading. This is what the trial court's only finding on this point actually says:

> 5. The defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value.
>
> In this regard, the Court does not agree with the State's interpretation of A.R.S. 13-703(F)(5) and State v. Madsen filed March 26, 1980. The Court believes that when A.R.S. 13-703(F)(4) and (5) are read together that they are intended to apply to a contract-type killing situation and not to a robbery, burglary, etc.

J.A. 54-5. The special verdict contained similar findings on each of the Arizona statutory aggravating factors. J.A. 53-58. Nowhere in the record of this case is there any finding, prior to the state's appeal, "that Rumsey committed the crime for pecuniary gain." Pet. Br. 19.[1]

B. The State's Cross Appeal.

The second point we think needs clarification is the nature of and basis for the State's appeal from the original judgment. Petitioner's Brief says "the State appealed from the imposition of a

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[1] The trial court did say, in imposing its robbery sentence, "the Defendant planned this robbery ... in order to obtain ... a few hundred dollars ...." J.A. 66. It said nothing there, or elsewhere, about any "pecuniary gain" motive for the homicide, however.

Even in its second sentencing verdict, after the remand, the trial court simply cited the Arizona Supreme opinion to support its "pecuniary gain" finding. J.A. 119-20. It never discussed the evidence on this point; but there was some evidence, in Rumsey's confession, that the homicide was unplanned and unintended. RT 6/4/80 at 56-62.

life sentence" (Pet. Br. 6), and the suggestion that Arizona law allows such an appeal underlies petitioner's claim that the trial and appeal of an Arizona capital case are part of a "single procedure." Pet. Br. 29-31.

In fact, as the Arizona Supreme Court's first opinion in this case notes, the sole basis for the State's appeal here was A.R.S. §13-4032(4), which permits an appeal from "[a] ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment." State v. Rumsey (I), 636 P.2d 1209, 1213 (Ariz. 1981); Pet. App. A 36-37. The state court's second opinion makes clear this was the only possible basis under Arizona law for such an appeal.

> the state is not permitted an appeal unless the defendant has appealed. A.R.S. §13-4032(4). This, of course, is inconsistent with the state's "single procedure" argument.

State v. Rumsey (II), 665 P.2d 48, 55 n.10 (Ariz. 1983); Pet. App. A 19.[2]

C. The Remand And Resentencing.

The third area in which Petitioner's Brief is critically misleading is its description of the Arizona Supreme Court's first remand, and the resentencing that followed from it.

It is simply untrue that on remand "[t]he only thing left to do was correct the trial court's error." Pet. Br. 20. The state court's reversing decision "remanded for a redetermination of aggravating and mitigating circumstances and resentencing." State v. Rumsey (I), supra, 636 P.2d at 1214; Pet. App. A 39. Though petitioner suggests that Arizona

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[2] In light of this holding, we cannot understand Petitioner's statement that "[t]he Arizona Supreme Court has not yet determined whether the State can appeal a life sentence where the defendant does not appeal." Pet. Br. 29.

law subjects an erroneous sentence to "a correction [which] will not allow the state to regroup and try once more to prove its case of death" (Pet. Br. 32), the state court below said that to so limit a resentencing hearing would require it to reverse its past decisions and "rewrite the statute." State v. Rumsey (II), supra, 665 P.2d at 56; Pet. App. 22.

A full scale resentencing is what the remand allowed, and what occurred here. At the resentencing, the prosecutor did not argue simply "that the trial court was free to find that the crime had been committed for pecuniary gain ...." Pet. Br. 7. The prosecutor argued that the trial court should find all three of the statutory aggravating circumstances it had

previously rejected. J.A. 82-91.[3] He also pointed to additional allegations against the defendant which had not been presented at the original sentencing at all (J.A.80-81),[4] which he asked the court to consider in "determining whether the original life sentence was inappropriate" (J.A. 110).

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[3] The prosecutor did not argue the court "was free to find" the "pecuniary gain" aggravating circumstance, but "that the Supreme Court has indicated [it] applies in this particular matter." J.A. 91. The trial court's finding appears to accept this as mandated. J.A. 119-120, 131.

[4] The new information was submitted by the prosecution as part of its presentencing memorandum, and consisted of two indictments--one in Indiana and one in Arizona--charging the defendant with other crimes. Ibid. The Indiana case involved a crime the defendant allegedly committed before his arrest in this case; the charge in Arizona, an incident after his imprisonment. J.A. 98. Neither indictment was ever tried. Ibid.

It was on these facts--not petitioner's hypotheticals--the Arizona Supreme Court unanimously held the double jeopardy clause had been violated.

ARGUMENT

I. THE ARIZONA SUPREME COURT CORRECTLY HELD THAT WHAT HAPPENED IN THIS CASE--A RETRIAL AFTER AN EXPLICIT ACQUITTAL--SQUARELY VIOLATES THE FIFTH AMENDMENT

We do not believe that, once the facts of this case are understood, it presents a close double jeopardy question. The unanimous decision of the court below, that Bullington v. Missouri forbids what was done here, is clearly correct.

Indeed, we believe that what was done in this case--the reversal of a fact finding and judgment against the state, because of a later-discovered legal error violates the Fifth Amendment under any analysis. Both the majority and dissenting opinions in Bullington support the judgment below.

A. The Proceedings In This Case Violated Double Jeopardy Principles Accepted By Both The Majority And Dissenting Justices In Bullington v. Missouri.

The double jeopardy question presented by this case is not nearly as close as that in Bullington v. Missouri. Bullington required the application of longstanding double jeopardy principles to the novel implications of a capital sentencing decision, under a statute enacted to comply with Furman v. Georgia, 408 U.S. 238 (1972). This case presents a much more conventional double jeopardy problem: the finality of an explicit finding, in a bench trial, that a factual element of the prosecution's case has not been proven. Neither the majority nor dissenting Justices in Bullington doubted that such a finding in a criminal case . cannot be relitigated.

Certainly, as the court below found, no distinction between the Arizona and Missouri sentencing proceedings justifies a departure from Bullington here. In Arizona no less than Missouri, a sentencing hearing in a capital case is "itself a trial on the issue of punishment so precisely defined by ... statut[e]." Bullington v. Missouri, 451 U.S. at 438.

In Missouri, as the Bullington Court noted,

> counsel make opening statements, testimony is taken, and evidence is introduced, the jury is instructed, and final arguments are made. The jury then deliberates and returns its formal punishment verdict.

451 U.S. 438 n.10. At an Arizona sentencing hearing, too, "evidence relevant to aggravating or mitigating

circumstances is presented,"[5] and "[t]he

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[5] The Petition for Certiorari in this case informed the Court that "there are seldom live witnesses in an Arizona sentencing hearing" (Cert.Pet. 15); Petitioner's Brief here implies the same thing. Pet. Br. 24-6. To the contrary, live witnesses are the rule, not the exception, in capital sentencing proceedings in Arizona. See State v. Lee, 559 P.2d 657, 662 (Ariz. 1976); State v. Morales, 587 P.2d 236, 245 (Ariz. 1978); State v. Bishop, 576 P.2d 122, 128 (Ariz. 1978); State v. Brookover, 601 P.2d 1322, 1325 (Ariz. 1979); State v. Evans, 606 P.2d 16, 17 (Ariz. 1980); State v. Arnett, 608 P.2d 778, 780-81 (Ariz. 1980); State v. Madsen, 609 P.2d 1046, 1054 (Ariz. 1980); State v. Ceja, 612 P.2d 491, 492 (Ariz. 1980); State v. Steelman, 612 P.2d 475, 478 (Ariz. 1980); State v. Gretzler, 612 P.2d 1023, 1055 (Ariz. 1980); State v. Bishop, 622 P.2d 478, 480 (Ariz. 1981); State v. Greenawalt, 624 P.2d 828, 849 (Ariz. 1981); State v. Watson, 628 P.2d 943, 945 (Ariz. 1980); State v. Smith, 638 P.2d 696, 697 (Ariz. 1981); State v. Ortiz, 639 P.2d 1020, 1034 (Ariz. 1982); State v. Carriger, 645 P.2d 816 (Ariz. 1982); State v. McMurtrey, 664 P.2d 637, 645 (Ariz. 1983); State v. Smith, 665 P.2d 995, 1002 (Ariz. 1983).

parties are entitled to rebut and argue."[6] State v. Rumsey (II), supra, 665 P.2d at 53; Pet. App. A 14. In Arizona, no less than Missouri, "[t]he burden of establishing the existence of aggravating circumstances is on the prosecution," the court "return[s] a special verdict setting forth its findings," "[t]here are but two alternatives--life imprisonment or death," and "[s]pecific instructions are given with regard to the final conclusion to be reached." Ibid. The Arizona Supreme Court was thus clearly correct that "Arizona procedure ... closely resembles a trial" within the meaning of Bullington. Id. at 665 P.2d 53; Pet. App. A 15.

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6 While suggesting Arizona lawyers do not argue sentence (Pet. Br. 22), petitioner itself describes the kind of "'argument on the evidence and the applicable law in his favor,'" Herring v. New York, 422 U.S. 853, 860 (1975), quoting Yopps v. State, 178 A.2d 879, 881 (Md. 1962), which is part of any bench or jury trial. Pet. Br. 25-26. Such argument was presented in this case. J.A. 11-51.

It is true that, in Arizona, like Missouri, sentences of death are subject to review by the Arizona Supreme Court, which has reversed some death sentences as disproportionately severe. Pet. Br. 26-27. Missouri law contains a similar, more elaborate appellate review provision. Revised Statutes of Missouri 1978 §565.014(3).[7] But that hardly means the sentencing hearing, in either Arizona or Missouri, is simply "the beginning of a winnowing process ...." Pet. Br. 28.

As we noted above, the Arizona Supreme Court in this very case explicitly rejected the suggestion that "the state can appeal a death sentence if it is illegal" and that "the state can appeal a

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[7] The Arizona Supreme Court's review powers are not granted by statute, but were undertaken in light of this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976). See State v. Richmond, 560 P.2d 41, 51 (Ariz. 1976).

life sentence where the defendant does not appeal." Pet. Br. 29. State v. Rumsey (II), supra, 665 P.2d at 55 n.10; Pet. App. A 19.

> While we have an independent duty of review, we perform it as an appellate court, not as a trial court. We have never held that if the trial court finds sufficient mitigating circumstances we have independent power to reject its factual and legal conclusions and impose the death penalty. Our obligation on review is to determine whether "the punishment imposed is greater than the circumstances of the case warrant." State v. Richmond, 114 Ariz. at 196, 560 P.2d at 51... Our proportionality review is not to determine whether life imprisonment was too lenient, but, rather, to determine "whether the sentences of death are excessive or disproportionate." Id.

Id. at 665 P.2d 55; Pet. App. A 20-21 (footnote omitted).

> [T]he Arizona procedure is not a single indivisible hearing, but instead resembles a trial on the issue of life or death followed by utilization of this court's appellate process ....

Id. at 665 P.2d 55; Pet. App. A 22. That settled the Arizona law on this question.

The Missouri procedures followed in Bullington, and the Arizona law applied here, do differ in two substantial respects. First, Arizona does not allow a jury trial on the existence of aggravating circumstances which make the crime subject to death, or on the issue of sentence itself. A.R.S §13-703(C). Second, the Arizona statute is mandatory: if the trial court finds an aggravating circumstance and "no mitigating circumstances sufficiently substantial to call for leniency," there is no discretion; the sentence "shall" be death. Ibid.

We believe both of these features raise serious questions about the constitutionality of the Arizona death penalty law. See Part II, below. But whether or not these features separately render this law unconstitutional, they certainly do not alleviate the double jeopardy problem in this case.

Clearly, there is no double jeopardy significance to the fact that an Arizona capital sentencing hearing is heard by a judge instead of a jury.

> For purposes of double jeopardy, it has never made a difference whether a case was tried before a judge or a jury. See United States v. Morrison, 429 U.S. 1, 3, 97 S.Ct. 24, 50 L.Ed.2d 1 (1976) .... "Since the Double Jeopardy Clause of the Fifth Amendment nowhere distinguishes between bench and jury trials, the principles given expression through that Clause apply to cases tried to a judge." Id. at 3, 97 S.Ct. at 26 (quoting United States v. Jenkins, 420 U.S. 358, 365, 95 S.Ct. 1006, 1011, 43 L.Ed.2d 250 (1975)).

State v. Rumsey (II), supra, 665 P.2d at 54; Pet. App. A 18-19. That is established beyond doubt.[8] Even the petitioner does not seriously argue that the identity of the fact finder alone is

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8 See, e.g., Tibbs v. Florida, 457 U.S. 31, 41 (1982); Sanabria v. United States, 437 U.S. 54, 64 n.18 (1978); Burks v. United States, 437 U.S. 1 (1978); Serfass v. United States, 420 U.S. 377, 388 (1975); United States v. Jorn, 400 U.S. 470, 479 (1971); Fong Foo v. United States, 369 U.S. 141 (1962).

sufficient to distinguish this case from Bullington.

Neither is the only other unique aspect of Arizona law: that "the trial court is required to impose a sentence of death if the state proves the existence of one or more aggravating factors and the defendant fails to prove any mitigating factors ...." Pet. Br. i. To the contrary, the crux of the Bullington decision was the fact that Missouri law required the sentencer "to determine whether the prosecution has 'proved its case,'" Bullington v. Missouri, supra, 451 U.S. at 444, and did "not giv[e] unbounded discretion to select an appropriate punishment from a wide range authorized by statute," id. at 438.

In this respect, Arizona's sentencing procedure resembles an ordinary criminal trial more closely than Missouri's. In Bullington, the Court noted that

> A Missouri jury is instructed that it is not compelled to impose a death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstance or circumstances.

451 U.S. at 434-35. An Arizona sentencing judge has no such sentencing discretion. See State v. Rumsey (II), supra, 665 P.2d at 53; Pet. App. A-15.

This aspect of the Arizona law eliminates the major objection of the dissenting Justices in Bullington. An Arizona sentencer clearly has no function "to mete out just deserts as he sees them." 451 U.S. at 450 (dissenting opinion of Justice Powell). That means that any Arizona decision against death must constitute a finding "that the State adduced insufficient evidence"--because an Arizona trial court cannot "choose life imprisonment rather than death even if it found beyond a reasonable doubt that the

State had proved the existence and gravity of [aggravating] ... circumstances." Id. at 452 n.4.

It is because of this feature of Arizona law--and its application in this case--that we believe the petitioner's formulation of the issue here is fundamentally flawed. As we have pointed out above, Rumsey's trial court did not simply pronounce sentence; it delivered a verdict which included findings of fact explicitly rejecting the State's contentions. That verdict said "the defendant did not commit the offense as consideration for the receipt or in expectation of the receipt of anything of pecuniary value" (J.A. 54) (emphasis added); and "no aggravating circumstances exist" (J.A. 57).

That verdict was not just an "implicit acquittal;" it was an explicit acquittal, by definition:

> "the ruling of a judge, whatever its label, actually represent[ing] a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged."

United States v. Scott, 437 U.S. 82, 97 (1978), quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Whether or not that acquittal resulted from a misinterpretation of Arizona law, it is no less final for double jeopardy purposes.

> The Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.

Tibbs v. Florida, supra, 457 U.S. at 41.

> "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' See Fong Foo v. United States, 369 U.S. 141, 143, [7 L.Ed.2d 629, 82 S.Ct. 671]. If the innocence of the accused has been confirmed by a final

> judgment, the Constitution conclusively presumes that a second trial would be unfair." Arizona v. Washington, 434 U.S. at 503, 54 L.Ed.2d 717, 98 S.Ct. 824.

United States v. DiFrancesco, 449 U.S. 117, 129 (1980). A "judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error." Sanabria v. United States, 437 U.S. 54, 69 (1978). Even though "an acquittal on the question of guilt or innocence does not necessarily mean that the State adduced insufficient evidence, ... yet such acquittals are final." Bullington v. Missouri, supra, 451 U.S. at 452 n.4 (dissenting opinion of Justice Powell).

This case does not, therefore, reraise the difficult questions first decided in Bullington. The trial court did not simply decide sentence here.

Sitting as finder of fact, it found the defendant had not committed the kind of a crime that Arizona law says is punishable by death. An appeals court later decided that in so finding, the trial judge misread the law, and ordered a new trial. Long before Bullington it was settled that the Fifth Amendment bars such relitigation of a criminal case, even where it is clear that an "acquittal was based on an egregiously erroneous foundation." That is all the Court need reaffirm here.

B. There Is No Reason To Overrule Bullington v. Missouri.

The petitioner sought certiorari in this case based on supposed differences between the Arizona and Missouri death sentencing statutes, which it claimed distinguished Bullington v. Missouri. See Cert. Pet. i, 9, 28. Having failed to establish those distinctions, it now says

"[t]his case is a good opportunity ... for the Court to reassess its holding in Bullington." Pet. Br. 33.

We disagree. We think there is no occasion here to reassess Bullington at all, because the decision below would stand under the analyses of either the majority or dissenting Justices there. If we are wrong, and the Court finds that this case is indistinguishable from Bullington, Bullington should be reaffirmed. Nothing in petitioner's arguments, and nothing that has happened since justifies its overruling now.

We recognize that the Court was closely divided in Bullington, and there were strong arguments on both sides of the issue in that case. We believe the majority decision in Bullington was correct. But that is not the issue now. The issue now is, if the Court finds Bullington indistinguishable from this

case, is there a reason to discard that major constitutional precedent, a scant two years after it was made.

We think there is not. Certainly, the difficult distinctions between Bullington and DiFrancesco which petitioner points to (Pet. Br. 33-34), are nothing new: they were fresh in the Court's mind, and the focus of the Court's analysis, in Bullington itself.

Nor have any difficulties arisen in lower courts with Bullington's application which justify its reexamination. At the time it was decided, the Bullington majority decision was already in accord with all the state courts, other than Missouri's, which had considered the question under modern statutes in recent

years.[9] Bullington's affirmance of that position as a matter of federal constitutional law caused no major disruption, and has been followed by lower courts without notable confusion.[10]

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[9] Sanne v. State, 609 S.W. 2d 762 (Tex.Crim.App. 1980); Commonwealth v. Littlejohn, 443 Pa. 336, 250 A.2d 811 (1969); People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal.Rptr. 77 (1963); Roberson v. State, 258 So.2d 257 (Fla. 1971); State v. Washington, 380 So.2d 64 (La. 1980); Ward v. State, 236 S.E.2d 365 (Ga. 1977).

[10] In only one case, previous to this, has an issue arisen under Bullington which this Court found sufficiently important to warrant its attention. Estelle v. Bullard, 457 U.S. 1116 (1982). That issue was mooted when the state court decided independently to follow Bullington's lead as a matter of independent state constitutional law. Ex parte Augusta, 639 S.W.2d 481 (Tex. Crim. App. 1982); see Estelle v. Bullard, 103 S.Ct. 776 (1983); Bullard v. Estelle, 708 F.2d 1020 (5th Cir. 1983).

Bullington also remains fully consistent with the Fifth and Eight Amendment decisions this Court has rendered since. The line between Bullington and DiFrancesco remains clearly marked by the "qualitative difference between death and any other permissible form of punishment," Zant v. Stephens, 51 U.S.L.W. 4891, 4897 (June 23, 1983), the "substantive limitations on the ... factors that a capital sentencing jury may consider in determining whether death is appropriate," California v. Ramos, 51 U.S.L.W. 5220, 5223 (June 28, 1983), and the need to "minimiz[e] the risk of wholly arbitrary, capricious, or freakish sentences" in capital cases, Pulley v. Harris, 52 U.S.L.W. 4141, 4143 (January 23, 1984).

There simply are no "'lessons of experience,'" United States v. Scott, supra, 437 U.S. at 101, which should call

Bullington's rule, so recently settled, into question. Absent some compelling reason to reexamine so new and important a precedent, principles of stare decisis cry out against it.

Stare decisis considerations are especially weighty in the context of this issue: for Bullington's rule is one which fixed legal relationships and informed legal decisions in matters of life and death. Bullington removed from our law "the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might ... [lead] to a retrial and death sentence." Fay v. Noia, 372 U.S. 391, 440 (1963). It would be truly ironic if, after it had been relied on, Bullington was suddenly discarded now.

Rumsey's counsel's reliance on Bullington, to the near exclusion of all other defenses at the resentencing hearing

below (J.A. 95-107), is illustrative. So, too, are the cases petitioner has pointed to (Cert. Pet. 9-10 n.1) where defendants have received life sentences and appealed, assured by Bullington that to do so does not jeopardize their lives. Basic principles of fairness cry out against suddenly retracting that assurance.

> If the doctrine of stare decisis has any meaning at all, it requires that people in the everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance.

United States v. Mason, 412 U.S. 391, 399-400 (1973). That must be doubly true where the penalty is death.

Bullington has been decided. This Court did not grant certiorari to reconsider it, and it should not entertain that suggestion now.

II. SEPARATE CONSTITUTIONAL QUESTIONS ARE ALSO RAISED BY THE STRUCTURE OF THE ARIZONA DEATH SENTENCING STATUTE.

We recognize that certiorari was granted here solely on the double jeopardy issue this case presents. We are constrained, however, to call the Court's attention to two additional constitutional issues submerged in the proceedings in this case.

We mention these because of a concern that, in describing the legal matrix from which the double jeopardy issue here arises, the Court might appear to place its imprimatur on the Arizona death sentencing law itself. We are convinced the two major aspects of that procedure which distinguish it from the Missouri statute considered in Bullington are both, themselves, constitutional defects.

These two aspects of Arizona law distinguish it, not just from the law of

Missouri, but from every other statute this Court has examined since Furman v. Georgia, 408 U.S. 238 (1972). Arizona totally excludes the jury from the sentencing stage of capital cases, and Arizona makes the death sentence mandatory on the sentencing judge, upon certain findings of fact. This Court's cases since Furman, and centuries of precedent regarding the role of juries in criminal cases, raise serious questions about the constitutionality of both of these features of this law.[11]

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[11] Respondent Rumsey raised constitutional challenges to both these aspects of the Arizona law, in his appeal below. Appellant's Opening Brief, State v. Rumsey, Ariz. Sup. Ct. No. 5042-2, pages 21-22. The state court did not reach the issue in this case, because of its decision on the double jeopardy issue. It has upheld the statute against similar challenges in other cases, however. See, e.g., State v. Jordan, 672 P.2d 169 (Ariz. 1983).

A. The Exclusion Of The Jury From Its Traditional Fact Finding Role In Capital Cases.

Arizona is one of five states which, after Furman v. Georgia, supra, enacted laws which removed the jury from the death sentencing process.[12] The constitutional validity of such statutes remains unsettled. Proffitt v. Florida, 428 U.S. 242, 252 (1976); Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978).

Arizona law denies capital defendants more than just jury sentencing, however. In Arizona the judge alone decides whether a murder involves any of the aggravating

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[12] The other four states are Idaho (Idaho Code §19-2515), Montana (Montana Code Ann. §46-18-301), Nebraska (Neb. Rev. Stat. §29-2520) and Oregon. The Oregon statute has been held unconstitutional because of its restriction of the jury function. State v. Quinn, 623 P.2d 630, 644 (Or. 1981). Prior to Furman, every state had authorized jury sentencing in capital cases. McGautha v. California, 402 U.S. 183 (1971).

facts which make it a capital crime under Arizona law. A.R.S. §13-703(C). Those "aggravating circumstances" are, for all practical purposes, elements of capital murder in Arizona.[13] See Jurek v. Texas, 428 U.S. 262, 271 (1976).

This withdrawal of the right to jury trial on these facts squarely contravenes the Sixth Amendment, and a bedrock principle of our legal system:

> The trial of a criminal case places the fact finding function in a jury of twelve unless by statute or consent the jury is fixed at a lesser number or a jury is waived.

Press Enterprise v. Superior Court, Riverside County, 52 U.S.L.W. 4113, 4114

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[13] Under ARS 13-703(E), a finding of "one or more of the aggravating circumstances enumerated in subsection F" requires a death sentence if "there are no mitigating circumstances sufficiently substantial to call for leniency." Aggravating circumstances must be established by competent evidence, and must be proven beyond a reasonable doubt. ARS §13-703(C); State v. Jordan, 614 P.2d 825, 828 (Ariz. 1980).

(January 18, 1984). Justice Story called "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law." United States v. Battiste, 2 Sumner 240, 243 (1835).

The rule predates our Constitution. It was settled in England by 1613. Isaack v. Clark, 1 Rolle 126, 135 (1613).[14] It came to America shortly thereafter:

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[14] See Thayer, A Preliminary Treatise on Evidence at Common Law 185 (1898). The principle appears to have been established even earlier than this. "Mr. Hallam, in his Constitutional History of England ... said that as early as the reign of Henry VII one of the essential checks upon royal power was that 'the fact of guilt or innocence on a criminal charge was determined in a public court ... by a jury of twelve men ....'" Maxwell v. Dow, 176 U.S. 581, 609 (1900) (dissenting opinion of Justice Harlan). See also Fortescu, De Landibus Legum Angliae (1468), reprinted in Carpenter and Stafford, Readings in Early Legal Institutions 347 (1932).

> The first ordinance adopted by the Plymouth Colony in 1623 was one declaring among other things that "all criminal facts" should be tried "by the verdict of twelve honest men to be impanneled by authority, in form of a jurye upon their oaths."

Maxwell v. Dow, supra, 176 U.S. at 609 (dissenting opinion of Justice Harlan).[15]

Lord Coke's latin phrasing became the accepted rule of English law:

> Ad quaestionem facti non respondent judices, ad quaestionem juris non respondent juratores.

W. Forsyth, History of Trial by Jury 259 (1852). That rule was the foundation of the historic decision in Bushell's Case, 6 Howard State Trials 999, Vaughn's Rep. 135

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[15] See also Heller, The Sixth Amendment to the Constitution of the United States 16 (1951). The same appears to have been the law in the other colonies. See, e.g., Scott, Criminal Law in Colonial Virginia 86-87 (1930).

(1670), that jurors could not be imprisoned for "falsely" acquitting:

> That decantatum in our Books, Ad quastionem facti non respondent Judices, ad quastionem legis non respondent Juratores, literally taken is true: for if it be demanded, what is the fact? the judge cannot answer it ....

Id. at Vaughn's Rep. 149.

The rule was settled by the 18th Century, and acknowledged by Blackstone.[16] Lord Mansfield called it "the fundamental definition of trial by jury." Proceedings Against The Dean of St. Asaph, 21 Howells State Trials 847, 1039 (1783).

> It may safely be said that at the time of the American Revolution the general principle was well established in English law that "juries must answer to questions of fact and judges to questions of law.

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> [T]he founders of the English law have with excellent forecast contrived ... that the truth of every accusation ... should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen and superior to all suspicion.

4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed. 1900) (emphasis added).

This is the fundamental maxim acknowledged by the constitution."

Scott, Trial by Jury and the Reform of Civil Procedure, 31 HARV.L.REV. 669, 679 (1918). That maxim underlay the "insistence on jury trial" in the first Congress, which led to the Bill of Rights. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 HARV.L.REV. 49, 74-5 (1923). As Justice Powell has noted, in criminal cases it has been "steadfastly adhered to" ever since. Powell, Jury Trial of Crimes, 23 WASH. & LEE L.REV. 1, 5 (1966).

Arizona's break from this tradition is particularly drastic, because the facts it leaves to the judge include those which "go to the criminal acts for which the defendant is to be punished." State v. Quinn, supra, 623 P.2d at 644. Some of those--like the "pecuniary gain" allegation here--involve questions of mens

rea; but it has always been thought that

> [w]here the intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to a jury.

Morrissette v. United States, 342 U.S. 246, 274 (1952).

Arizona has "redefin[ed] the elements that comprise different crimes, characterizing them as factors that bear solely on the extent of punishment," Mullaney v. Wilbur, 421 U.S. 684, 698 (1974), to reverse five centuries of Anglo-American law which reserves all rulings on the existence of such elements to a jury of lay citizens. The validity of that action should not be assumed in deciding this case.[17]

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17 A related, but different, issue regarding the jury function in capital cases is presently before the Court as one of the issues presented in Spaziano v. Florida, No. 83-5596

B. The Mandatory Nature Of Arizona's Death Sentencing Statute.

The second troublesome and unique feature of the Arizona law is its mandatory sentencing formula. As we noted above, the statutory language is clear.

> The court ... shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection F of this section and there are no mitigating circumstances sufficiently substantial to call for leniency.

ARS §13-703(E). The Arizona Supreme Court has taken this literally:

> "where one or more statutory aggravating circumstances is found, and no mitigation exists, the statute requires the death penalty."

State v. Jordan, supra, 672 P.2d at 173, quoting State v. Gretzler, 659 P.2d 1, 13, cert. denied 103 S.Ct. 2444 (1983).

This statute shares with those of a number of other states the questionable placement on the defendant of "the burden of proving that the death penalty was

inappropriate in his particular case." Jones v. Illinois, 78 L.Ed.2d 264, 265 (1983) (Justice Marshall, dissenting from denial of certiorari). Its unique characteristic is its mandatory nature. In that feature it clearly departs from what this Court has said a capital punishment statute must do.

> What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. See Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); Lockett v. Ohio, 438 U.S. 586, 601-605 (1978) (plurality opinion); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637 (1977); Gregg, supra, at 197 (plurality opinion); Proffitt v. Florida, 428 U.S., at 251-252 (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303-304 (1976) (plurality opinion).

Zant v. Stephens, supra, 51 U.S.L.W. at 4895 (original emphasis).

> Once the jury finds that the defendant falls within the leglislatively defined category of persons eligible for the death penalty ... the jury is then free to consider a myriad of factors to

> determine whether death is the appropriate punishment. In this sense, the jury's choice between life and death must be individualized.

California v. Ramos, supra, 51 U.S.L.W. at 5225.

Arizona law does not permit individualized capital sentencing decisions. It mandates a death sentence whenever any statutory aggravation is found, unless the defendant establishes, by a preponderance of the evidence, the existence of mitigating circumstances sufficient to "warrant leniency." A.R.S. §13-703(C).

Justice Stevens pointed out the dangers inherent in such a statutory sentencing formula, in his separate opinion in Smith v. North Carolina, 61 U.S.L.W. 3418 (November 30, 1983). Addressing a less restrictive statute than this, he noted that the sentencer

> might answer both of [the statutory] ... questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "the determination that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, supra, 438 U.S. at 601 (plurality opinion), quoting Woodson v. North Carolina [supra, 428 U.S. at 305].

Ibid.

By mandating the death penalty whenever a single aggravating factor is proven, unless the defendant proves sufficient mitigation to overcome it, we believe the Arizona statute creates an unacceptable "'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" Eddings v. Oklahoma, 455 U.S. 104, 117 (1982) (concurring opinion of Justice O'Connor), quoting Lockett v. Ohio, supra,

438 U.S. at 605. Whether that we are correct in that belief remains to be decided. We point it out here lest the Court appear to decide it, in addressing the double jeopardy question that has arisen from its application in the particular circumstances of this case.

CONCLUSION

Respondent Rumsey's resentencing to death, after the trial court had found all statutory aggravating circumstances absent in his case, clearly violated the Fifth Amendment. The decision of the court below should be affirmed.

Respectfully submitted,

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March 28, 1984

No. 83-226-CSY
Status: GRANTED

Title: Arizona, Petitioner
v.
Dennis Wayne Rumsey

Docketed:
August 12, 1983

Court: Supreme Court of Arizona

Counsel for petitioner: Schafer III, William J.

Counsel for respondent: Rummage, James R.

Entry	Date	Note	Proceedings and Orders
1	Aug 12 1983	G	Petition for writ of certiorari filed.
2	Sep 12 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Sep 12 1983		Brief of respondent Dennis Wayne Rumsey in opposition filed.
4	Sep 14 1983		DISTRIBUTED. October 7, 1983
6	Oct 11 1983		REDISTRIBUTED. October 14, 1983
9	Oct 19 1983		REDISTRIBUTED. October 28, 1983.
11	Oct 31 1983		REDISTRIBUTED. November 4, 1983
13	Nov 7 1983		REDISTRIBUTED. November 11, 1983
15	Nov 28 1983		REDISTRIBUTED. December 2, 1983
17	Dec 5 1983		REDISTRIBUTED. December 9, 1983
19	Dec 12 1983		REDISTRIBUTED. January 6, 1984
20	Jan 9 1984		Motion of respondent for leave to proceed in forma pauperis GRANTED.
21	Jan 9 1984		Petition GRANTED.
			**********
22	Jan 25 1984	G	Motion of respondent for appointment of counsel filed.
23	Feb 1 1984		DISTRIBUTED. February 17, 1984. (Above motion).
24	Feb 21 1984		Motion for appointment of counsel GRANTED and it is ordered that James R. Rummage, Esquire, of Phoenix, Arizona, is appointed to serve as counsel for the respondent in this case.
25	Feb 25 1984		Joint appendix filed.
26	Feb 25 1984		Brief of petitioner Arizona filed.
27	Mar 20 1984		SET FOR ARGUMENT. Monday, April 23, 1984. (2nd case)
28	Mar 26 1984		CIRCULATED.
29	Mar 29 1984		Record filed.
30	Mar 28 1984	X	Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed.
31	Mar 20 1984	X	Brief of respondent Dennis Wayne Rumsey filed.
32	Apr 23 1984		ARGUED.